

v. 2993 No. 14695

United States
Court of Appeals
for the Ninth Circuit

See vol. 2994

MID-STATES INSURANCE COMPANY, a corporation, and THE ANGLO CALIFORNIA NATIONAL BANK OF SAN FRANCISCO,
Appellants,

vs.

AMERICAN FIDELITY AND CASUALTY COMPANY, INC., a corporation, AMERICAN PLAN CORPORATION, a corporation, MARK HART, JOSEPH LOTZ, RALPH L. SMEAD and L. SUDEKUM,

Appellees.

Transcript of Record

In Three Volumes

VOLUME I.

(Pages 1 to 400, inclusive.)

Appeal from the United States District Court for the Northern District of California, Southern Division

FILED

JUL 20 1955

No. 14695

United States
Court of Appeals
for the Ninth Circuit

MID-STATES INSURANCE COMPANY, a corporation, and THE ANGLO CALIFORNIA NATIONAL BANK OF SAN FRANCISCO,
Appellants,

vs.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

WALLACE, GARRISON, NORTON & RAY,
2200 Shell Building,
San Francisco, California,

SEVERSON & McCALLUM & DAVIS,
38 Sansome Street,
San Francisco, California,

Attorneys for Plaintiffs and Appellants.

BRONSON, BRONSON & McKINNON,
1500 Mills Tower,
San Francisco, California,

WORTHINGTON, PARK & WORTHINGTON,
Russ Building,
San Francisco, California,

RICHARD F. TIEDEMAN,
1440 Broadway,
Oakland, California,

Attorneys for Defendants and Appellees.

In the District Court of the United States, Northern District of California, Southern Division

No. 31311

MID-STATES INSURANCE COMPANY, a corporation,
Plaintiff,

vs.

THE ANGLO CALIFORNIA NATIONAL BANK OF SAN FRANCISCO, a national banking association,
Defendant.

COMPLAINT

Comes now plaintiff and for cause of action against defendant above named alleges as follows:

I.

Plaintiff is a corporation organized and existing under and by virtue of the laws of the State of Illinois. Defendant, The Anglo California National Bank of San Francisco is a national banking association organized and existing under and by virtue of the laws of the United States of America, and authorized to transact and transacting a general banking business in the State of California, with its principal place of business in the City and County of San Francisco, State of California. The matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars.

II.

At the times hereinafter set forth, Public Service

Insurance Co., a corporation, drew and executed certain of its checks, which said checks are hereinafter more particularly described, upon Pacific National Bank of San Francisco to the order of plaintiff. On or about the date on which each of said checks was drawn and executed, each of said checks was delivered by said Public Service Insurance Co. to one Joe Lotz; said Joe Lotz had authority to receive, but no authority to endorse said checks, or any of them, or any check for plaintiff. Thereafter said Joe Lotz endorsed each of said checks in the manner set forth on the back thereof and presented each of said checks to defendant and defendant paid the amount thereof upon said unauthorized endorsement: defendant did thereafter collect the amount of each of said checks in return for the delivery thereof to the said Pacific National Bank of San Francisco and has ever since retained and does still withhold from plaintiff the amount of each of said checks. The number, date of drawing and execution, and the amount of each of said checks is as follows:

No. 3590, Sept. 7, 1951, \$5,547.25; No. 3611, Sept. 14, 1951, \$67,500.00; No. 3628, Sept. 24, 1951, \$11,250.00; No. 3660, Sept. 28, 1951, \$3,750.00; No. 3699, Oct. 15, 1951, \$6,089.44.

A true copy of each of said checks is annexed hereto and marked Exhibits A, B, C, D and E, respectively, and said copies are by this reference made a part hereof.

III.

On November 16, 1951, George R. Fulmore-

Trustee drew and executed his check No. 980 upon Bank of America, National Trust and Savings Association, Fulton-Merced Branch, Fresno, California, for the payment of the sum of \$1,484.65 to the order of plaintiff; a copy of said check is attached hereto marked "Exhibit F" and by this reference is made a part hereof. On or about November 16, 1951, said check was delivered by said George R. Fulmore-Trustee to one Joe Lotz; said Joe Lotz had authority to receive, but no authority to endorse said check, or any check for plaintiff. Thereafter said Joe Lotz endorsed said check in the manner set forth on the back thereof and presented said check to defendant and defendant paid the amount thereof upon said unauthorized endorsement; defendant did thereafter collect the amount of said check in return for the delivery thereof to the said Bank of America, National Trust and Savings Association, and has ever since retained and does still withhold from plaintiff the amount of said check.

IV.

At the times hereinafter set forth, Jackson Motor Sales, a corporation, drew and executed certain of its checks, which said checks are hereinafter more particularly described, upon The Anglo California National Bank, Chico Office, Chico, California, to the order of plaintiff. On or about the date on which each of said checks was drawn and executed, each of said checks was delivered by said Jackson Motor Sales to one Joe Lotz; said Joe Lotz had authority to receive, but no authority to endorse said checks

or any of them, or any check for plaintiff. Thereafter said Joe Lotz endorsed each of said checks in the manner set forth on the back thereof and presented each of said checks to defendant and defendant paid the amount thereof upon said unauthorized endorsement; defendant did thereafter collect the amount of each of said checks in return for the delivery thereof to the said The Anglo California National Bank, Chico Office, Chico, California, and has ever since retained and does still withhold from plaintiff the amount of each of said checks. The number, date of drawing and execution, and the amount of each of said checks is as follows:

No. 4589, Nov. 17, 1950, \$1,599.76; No. 4868, Oct. 13, 1951, \$1,000.00; No. 4902, Nov. 10, 1951, \$800.00.

A true copy of each of said checks is annexed hereto and marked Exhibits G, H, and I, respectively, and said copies are by this reference made a part hereof.

V.

Plaintiff has demanded from defendant the payment of the amounts set forth in paragraphs II, III and IV hereof, but defendant has refused and still refuses to pay the same to plaintiff, and no part thereof has been paid.

VI.

Plaintiff is informed and believes, and on the basis of such information and belief alleges that there may be other checks upon which defendant paid sums to said Joe Lotz upon his unauthorized endorsement in the manner hereinabove set forth.

Plaintiff prays leave to move this Court for leave to amend this complaint with respect to any such check or checks when and if the same are discovered by plaintiff.

Wherefore, plaintiff prays judgment against defendant The Anglo California National Bank of San Francisco, a national banking association, in the sum of Ninety-nine Thousand Twenty-one and Ten Hundredths Dollars (\$99,021.10), with interest thereon at the rate of Seven per cent (7%) per annum as follows:

On \$ 5,547.25 from September 11, 1951;

On \$67,500.00 from September 18, 1951;

On \$11,250.00 from September 25, 1951;

On \$ 3,750.00 from October 1, 1951;

On \$ 6,089.44 from October 16, 1951;

On \$ 1,484.65 from November 21, 1951;

On \$ 1,000.00 from October 18, 1951;

On \$ 800.00 from November 16, 1951;

On \$ 1,599.76 from November 22, 1951;

for its costs of suit herein incurred and for such other and further relief as may be meet in the premises.

/s/ MAYNARD GARRISON,

/s/ JOHN R. PASCOE,

/s/ JOSEPH MARTIN, JR.,

/s/ WALLACE, GARRISON, NORTON
& RAY,

Attorneys for Plaintiff

[Endorsed]: Filed February 28, 1952.

In the United States District Court for the Northern District of California, Southern Division

No. 31496

MID-STATES INSURANCE COMPANY, a corporation,
Plaintiff,

vs.

AMERICAN FIDELITY AND CASUALTY COMPANY, INC., a corporation; THE AMERICAN PLAN CORPORATION, a corporation; MARK HART; JOSEPH LOTZ; RALPH L. SMEAD; L. SUDEKUM; JOHN WILL; FIRST DOE; SECOND DOE; THIRD DOE; FOURTH DOE; FIFTH DOE and SIXTH DOE,
Defendants.

COMPLAINT FOR FRAUD

Plaintiff complains of defendants and for cause of action alleges: .

I.

Plaintiff is an insurance corporation organized under the laws of the State of Illinois. Defendant American Fidelity and Casualty Company, Inc. (hereinafter called "American Fidelity"), is an insurance corporation organized under the laws of the State of Virginia and doing business in the State of California. Defendant The American Plan Corporation (hereinafter called "American Plan") is a corporation organized under the laws of the State of New York and was, at all times mentioned herein,

the manager of defendant American Fidelity. Defendant Mark Hart is, and at all times mentioned herein was, President of the defendants American Fidelity and American Plan and is a resident of the State of New York. Defendant L. Sudekum is, and at all times herein mentioned was, Executive Vice President of American Plan and is a resident of the State of New York; plaintiff does not know the full first name of said defendant and prays leave to amend this complaint when the same is ascertained. Defendant John Will is, and at all times mentioned herein was, Treasurer of American Plan and is a resident of the State of New York; Plaintiff does not know the true first name of said defendant and prays leave to amend this complaint when the same is ascertained. Defendants First Doe, Second Doe, Third Doe, Fourth Doe, Fifth Doe and Sixth Doe are, and at all times mentioned herein were, directors and/or officers and/or agents of defendants American Fidelity and/or American Plan, and are residents of the State of New York; plaintiff does not know the true names of said defendants and prays leave to amend this complaint when the same are ascertained. Defendant Joseph Lotz is, and at all times mentioned herein was, a resident of the State of California and a licensed insurance agent therein, Defendant Ralph L. Smead is, and at all times mentioned herein was, an employee of defendants Lotz, American Fidelity and American Plan and is a resident of the State of California. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

II.

On or about May 15, 1947, plaintiff appointed defendant Lotz its General Agent for the State of California, and defendant Lotz thereafter procured insurance business for and on behalf of plaintiff. On or about November 7, 1950, defendant American Fidelity appointed defendant Lotz its General Agent for the State of California, and defendant Lotz thereafter procured insurance business for and on behalf of defendant American Fidelity and on and after said date procured insurance business for and on behalf of plaintiff. Defendant Lotz remained plaintiff's General Agent for the State of California until January 21, 1952. Defendant Lotz remained the General Agent for the State of California of defendant American Fidelity until on or about August 17, 1951, when his authority as such was terminated by defendant American Fidelity but said defendant American Fidelity, for its own purposes, did not file the Notice of Termination of Appointment with the Insurance Commissioner of the State of California as required by the California Insurance Code until or on about October 31, 1951.

III.

On or about August 1, 1951, defendant Lotz was indebted to defendant American Fidelity in the sum of approximately \$190,984.00. Defendant Lotz was insolvent on said date and ever since that date has been insolvent, and all the defendants have at all of said times known that defendant Lotz was insolvent.

IV.

Defendant Lotz, as plaintiff's General Agent in the State of California, had a fiduciary relationship to plaintiff. Under the provisions of the Agency Agreement between plaintiff and defendant Lotz and under the appropriate provisions of the laws of the State of California and, especially Section 1730 of the Insurance Code of said state, defendant Lotz was under a duty to plaintiff to hold all premiums received by him on business written for the plaintiff, as trustee for the plaintiff, and all such premiums received by said defendant were received and held in his fiduciary capacity. This fact was well known to all the defendants.

V.

On or about August 1, 1951, the defendants other than defendants Lotz and Smead, conceived and prepared a plan (a) to induce and cause defendant Lotz to pay to defendants American Plan and American Fidelity, funds received by him as premiums on insurance written by him for plaintiff and (b) to apply said funds so received from defendant Lotz to the repayment of the indebtedness of defendant Lotz to American Fidelity, despite the fact that said funds were, and were known to said defendants to be, held as trust funds by defendant Lotz as fiduciary for plaintiff. The plan conceived and prepared by said defendants other than defendants Lotz and Smead, also contemplated and included the reduction and cancellation of the balance of defendant Lotz' indebtedness to defendant

American Fidelity by the cancellation of outstanding insurance written by defendant Lotz for defendant American Fidelity and having such insurance rewritten by defendant Lotz for plaintiff. Said defendants knew full well that defendant Lotz was wholly unable to pay to plaintiff premiums on said rewritten insurance and knew that plaintiff was not aware of defendant Lotz' insolvency and inability to pay to plaintiff the premiums on said insurance to be so rewritten, and said defendants planned to take all action necessary to conceal from plaintiff the fact of defendant Lotz' insolvency and inability to pay said premiums.

VI.

Pursuant to the plan so conceived and prepared by the defendants other than defendants Lotz and Smead, the former caused defendants Lotz and Smead to meet with them on or about August 13, 1951, at which meeting the plan conceived and prepared by the defendants other than Lotz and Smead was communicated to and discussed with defendants Lotz and Smead. Thereupon all the defendants, for the purpose of defrauding and deceiving plaintiff and enriching defendants American Fidelity and American Plan, agreed among themselves that defendant Lotz would pay to defendant American Fidelity and/or American Plan all funds received by him in his fiduciary capacity as trustee and agent for plaintiff, and representing premiums on insurance written by defendant Lotz for the plaintiff. The said defendants also conspired and agreed among themselves to take such action as might be

necessary to conceal defendant Lotz' insolvency from the plaintiff so that the plaintiff would allow defendant Lotz to continue to write insurance for the plaintiff including the rewriting of insurance on behalf of the plaintiff in substitution for insurance previously written by defendant Lotz on behalf of defendant American Fidelity which was to be cancelled by defendant American Fidelity in order to reduce the indebtedness of defendant Lotz to it. Said defendants further conspired and agreed among themselves, for the purpose of defrauding plaintiff for the benefit of defendants American Fidelity and American Plan, that defendant Lotz, in violation of his known fiduciary duty to plaintiff as its agent, would write excessively large amounts of insurance for plaintiff, regardless of the nature of the risks involved and at excessively high advance premiums to sub-agents, so that the defendants would be enabled to divert to defendants American Fidelity and American Plan such premiums as might be collected by defendant Lotz on such insurance from the trust funds held for plaintiff by said defendant Lotz.

VII.

All said defendants thereafter carried out the plan and conspiracy hereinabove referred to in the following manner:

(a) At the direction and instigation of the other defendants and by agreement with them, defendant Lotz fraudulently concealed from the plaintiff: (1) the fact that he was insolvent; (2) the fact that he had agreed to divert to defendants American Fidel-

ity and American Plan all trust funds held or to be received by him for the plaintiff as premiums on insurance written by him for the plaintiff; (3) the fact that he had conspired and agreed with other defendants in the manner aforesaid; (4) the fact that the rewriting of insurance by him on behalf of plaintiff in substitution for insurance previously written by him for defendant American Fidelity was for the sole purpose of enabling American Fidelity to reduce the amount of the otherwise uncollectible indebtedness due it from said defendant Lotz at the expense of plaintiff; (5) the fact that new insurance being written by him for plaintiff would be and was extraordinarily large and excessive in amount, on poor risks, and with high advance premiums to sub-agents; and (6) the fact that he had surrendered to defendants American Fidelity and American Plan, acting through defendants Hart and Smead, full control and authority over his insurance agency and finances. All said defendants, in addition to concealing the aforesaid facts with the purpose and intent, and with the result, of deceiving plaintiff so that plaintiff would not terminate defendant Lotz' Agency Agreement and would consent to defendant Lotz' rewriting insurance in substitution for insurance previously written by him for defendant American Fidelity, affirmatively represented to plaintiff that the reason defendant Lotz desired and intended to write more insurance for plaintiff and less for defendant American Fidelity, and, especially, the reason for his rewriting for plaintiff insurance originally writ-

ten for defendant American Fidelity, was that he had requested said defendant American Fidelity to grant him more favorable terms which said defendant had refused to do.

(b) On or about August 17, 1951, defendants American Fidelity, American Plan, Lotz and Smead, entered into an agreement whereby defendant Smead was appointed the representative of defendants American Fidelity and American Plan, and, as such, given full and complete control and authority over the financial affairs of defendant Lotz and his insurance agency for the purpose of diverting to defendants American Fidelity and American Plan all funds held or received by defendant Lotz, including all trust funds held or received by defendant Lotz and representing premiums on insurance written by said defendant for plaintiff. A true and correct copy of letter from defendant Hart, as President of defendant American Plan, to defendant Smead, dated August 17, 1951, and a true and correct copy of Memorandum of Agreement among defendants American Fidelity, American Plan, Lotz and Smead, dated August 22, 1951, under which defendant Lotz wrongfully abandoned to other defendants control over said trust funds belonging to plaintiff, are attached hereto marked Exhibits 1 and 2, respectively.

(c) Defendants, during the months of August, September, October and November diverted from plaintiff to or for the benefit of defendants American Fidelity and American Plan \$151,781.91 of

trust funds held or received by defendant Lotz as trustee for plaintiff.

(d) By November 1, 1951, by virtue of the diversion to defendants American Fidelity and American Plan of trust funds belonging to plaintiff and their application in reduction of the indebtedness of Lotz to defendant American Fidelity, such indebtedness has been reduced to the sum of approximately \$61,016.00. On or about said date the defendants, acting through defendants Smead and Lotz, caused insurance having a premium value of approximately \$61,016.00 which had originally been written by defendant Lotz for defendant American Fidelity, and in respect of which the assureds thereunder had already paid the premiums therefor, to be rewritten by Lotz for plaintiff, even though said defendants knew that defendant Lotz was wholly unable to pay plaintiff any part of the premiums payable thereon and that, because of defendants' fraudulent concealment and affirmative misrepresentation, plaintiff was unaware of Lotz' inability to pay and unaware also of the true reason for the rewriting of such insurance. Defendant American Fidelity thereupon cancelled the insurance originally written and, by avoiding its obligations thereunder which defendants had shifted to plaintiff, and crediting Lotz' account with defendant American Fidelity with the amount of such premiums, received payment in full of the balance of Lotz' indebtedness to it, all at the expense of plaintiff.

(e) That during all of the times mentioned from and after August 13, 1951, defendants, as part of the plan and scheme described herein, exerted great pressure and influence on defendant Lotz, and thereby induced defendant Lotz to pay excess commissions for insurance business; that the amount of commissions to be paid by defendant Lotz were in excess of the amount to be received by defendant Lotz as his general agency commission; that the business so written could not have failed to, and did, produce a loss to defendant Lotz which further increased the amounts owed by him to plaintiff; that as a result of said pressure and influence defendant Lotz was induced and compelled to accept insurance business of a sub-standard class; that such business could not have failed to, and did, produce an excess loss ratio and consequent underwriting loss to plaintiff; that as a result thereof plaintiff was further damaged in the sum of approximately \$84,300.00.

VIII.

On or about December 1, 1951, plaintiff, for the first time, learned of defendant Lotz' insolvency and thereafter, following an investigation, of the plan and conspiracy of the defendants to defraud and deceive plaintiff and of the various acts done pursuant thereto. Plaintiff promptly terminated its said Agency Agreement with defendant Lotz and demanded of defendants the trust funds held and received by defendant Lotz as trustee for plaintiff, and wrongfully and fraudulently diverted to de-

fendants American Fidelity and American Plan, and further demanded of defendants reimbursement for the large and substantial damages sustained by plaintiff by virtue of the other acts done by defendants Lotz, Smead, American Fidelity and American Plan in agreement with and at the instigation and direction of all the defendants in violation of Lotz' fiduciary duty to plaintiff, but defendants refused and still refuse to pay said sums or any portion thereof to plaintiff. Defendant Lotz is wholly unable to pay to plaintiff any part of his large and admitted indebtedness to plaintiff.

IX.

Plaintiff has, as a result of said plan and conspiracy of defendants to defraud and deceive it, and of the various acts done, permitted, directed and suffered by said defendants pursuant thereto, been damaged in the sum of \$297,097.91.

X.

In doing and permitting the things herein alleged, defendants have been guilty of fraud and deceit and have been actuated by malice towards plaintiff, and by reason thereof plaintiff demands exemplary and punitive damages against defendants in the sum of \$50,000.00.

Wherefore, plaintiff prays judgment against defendants and each of them for the sum of \$297,097.91, for the sum of \$50,000.00 as exemplary and punitive damages, for its costs of suit incurred

herein, and for such other and further relief as may be proper in the premises.

/s/ MAYNARD GARRISON,
/s/ JOHN R. PASCOE,
/s/ WALLACE, GARRISON, NORTON
& RAY,
Attorneys for Plaintiff

EXHIBIT No. 1

The American Plan Corporation
44 Wall Street, New York, N. Y.

Mr. Ralph L. Smead August 17, 1951
315 Fourteenth Street, Oakland, California

Dear Mr. Smead:

Under even date memorandum of agreement has been executed by Joseph Lotz which in part stipulates that you will serve as the representative of American Plan Corporation with respect to the ultimate liquidation of all monies referred to in Paragraphs 1 and 2 in said agreement.

As the representative of this corporation, you have full authority to deposit to the account of The American Fidelity and Casualty Company at the Central Bank in Oakland all monies received by Lotz, after taking into consideration the deduction prescribed in said agreement. You are to have full and supreme authority regarding financial affairs of Joseph Lotz, subject to instructions that may be transmitted to you from time to time by The American Plan Corporation, and in the event that you are

prevented from performing your responsibility in any respect it will be your duty to notify immediately The American Plan Corporation.

In consideration of the proper performance of your duties as representative and in the event the items referred to in Paragraphs 1 and 2 of said agreement are completely liquidated by September 15, 1951, you are to receive a fee from us in the sum of \$1,000.

Very truly yours,

/s/ MARK M. HART,
President

EXHIBIT No. 2

Memorandum of Agreement between American Fidelity and Casualty Company, Inc., (hereinafter called The Company), The American Plan Corporation (hereinafter called the Manager) and Joseph Lotz (hereinafter called Lotz). Dated August 22, 1951.

In consideration of the promises herein contained and other good and valuable consideration, it is understood among the Company, the Manager and Lotz as follows:

1. Lotz as a former agent of the Company has collected or has in the course of collection premiums on the behalf of the Company amounting to approximately \$240,000. (as evidenced by accounts current compiled and to be compiled by the Man-

ager) which have not been remitted to the Company or the Manager.

2. Lotz is also obligated to pay to the Company a sum approximating \$7,000. in connection with a reinsurance transaction.

3. Lotz agrees that all the monies referred to in Paragraphs 1 and 2 will be paid to the Company on or before September 15, 1951, and Lotz agrees that payments on account of said sums will be made by him at intervals as frequent as possible between the date of this agreement and September 15, 1951.

4. Commencing immediately all premiums received by Lotz will be deposited directly to the account of the Company at the Central Bank, Oakland, California; Lotz may deduct therefrom a sum not to exceed 10% for operating expenses, which deductions shall be a charge against Lotz and shall likewise be paid to the Company on or before September 15, 1951.

5. Despite termination of Lotz' agency agreement and subject to further instructions of the Manager, Lotz will

(a) Take all necessary steps to collect premiums from sub-agents and assureds and failing to collect will effect cancellations in accordance with established practice.

(b) Supervise and pay losses and loss adjustment expenses.

(c) Effect collection of salvage and subrogation.

(d) Use his best efforts in every respect to protect the interests of the Company.

6. The Manager agrees, termination of the

agency agreement notwithstanding, to credit Lotz monthly with commissions of 20% upon earned premiums as provided in the agency agreement dated November 7, 1950, but the Manager shall have the right to withhold payment thereof as an offset against monies due from Lotz to the Company or monies advanced by the Manager to the Company on Lotz' behalf. This Paragraph 6 in no wise shall affect provisions of said agency agreement relating to the withholding of commissions earned in excess of said 20%.

7. So long as any of the items referred to in Paragraphs 1 and 2 shall remain outstanding Lotz will

(a) Maintain his Trustee account at Central Bank, Oakland, and not open a Trustee account at any other bank or trust company.

(b) Not draw from the agency for himself a sum in excess of \$150 a week and will not increase the salaries of any employees except with the specific consent of the Manager or its representative.

(c) Not draw any sums for travel, entertainment, etc., without the specific consent of the Manager or its representative.

(d) Not make any capital expenditures without the specific consent of the Manager or its representative.

8. The Manager hereby appoints Ralph L. Smead as its representative and Lotz agrees that the said representative shall have full authority over the

finances of the agency and in connection with the matters referred to herein subject to instructions of the Manager. It is understood that the designation of Smead as representative shall be at the pleasure of the Manager and that the Manager may terminate such appointment and appoint a substitute representative at its discretion which substitute shall have the same authority as the original a representative by the Manager shall cease when a representative by the Manager shall cease when the items referred to in Paragraphs 1 and 2 hereof are fully satisfied.

9. Lotz agrees that expenses incurred by the Manager in connection with liquidation of the items referred to in Paragraphs 1 and 2 hereof and in the operation and implementation of this agreement shall be proper charges against Lotz.

10. Except as specifically provided herein, it is understood that this memorandum of agreement shall not be deemed a waiver of any obligations of Lotz or rights of the Company or the Manager under the aforesaid agency agreement of November 27, 1950, or otherwise. Without any limitation on the foregoing, it is agreed that in the event of a default by Lotz of any of the provisions of this Memorandum of Agreement, the Company may without notice exercise its rights under Paragraph 4 of the aforesaid agency agreement to take over and vest in itself Lotz' records, use and control of expirations.

11. The parties hereto agree to execute such

further and other documents as may be necessary to carry out the intentions and objectives of this Memorandum of Agreement.

American Fidelity and Casualty Company, Inc.,

The American Plan Corporation,

/s/ By Mark M. Hart, Pres., Mgr.,

The American Plan Corporation,

/s/ Mark M. Hart, Pres.

/s/ Joseph Lotz (L.S.)

Agreed:

/s/ Ralph L. Smead

[Endorsed]: Filed April 28, 1952.

[Title of District Court and Cause 31311.]

ANSWER

Comes now the Defendant, The Anglo California National Bank of San Francisco, a national banking association, and answering the Complaint of Plaintiff on file herein admits, denies and avers as follows, to-wit:

I.

Answering Paragraph I thereof, admits the allegations contained therein.

II.

Answering Paragraph II thereof, this Defendant has no information or belief upon and concerning

the matters therein alleged and for want of such information and belief denies each and every, all and singular, the allegations contained therein.

III.

Answering Paragraph III thereof, this Defendant has no information or belief upon and concerning the matters therein alleged and for want of such information and belief denies each and every, all and singular, the allegations contained therein.

IV.

Answering Paragraph IV thereof, this Defendant has no information or belief upon and concerning the matters therein alleged and for want of such information and belief denies each and every, all and singular, the allegations contained therein.

V.

Answering Paragraph V thereof, admits that Defendant has refused and still refuses to pay the amounts as alleged and denies that Plaintiff has demanded payment thereof from Defendant and that no part thereof has been paid.

VI.

Answering Paragraph VI thereof, this Defendant has no information or belief upon and concerning the matters therein alleged and for want of such information and belief denies each and every, all and singular, the allegations contained therein.

First Affirmative Defense

As a further separate and First Affirmative Defense to the Complaint of Plaintiff on file herein, Defendant avers as follows, to-wit:

I.

That at all of the times alleged and upon each of the occasions referred to in the Complaint of Plaintiff on file herein, the said Joe Lotz therein referred to was the duly authorized and acting general agent of Plaintiff and as such general agent (pursuant to an agreement in writing between Plaintiff and the said Joe Lotz, a copy of which, entitled "Agency Agreement" is attached hereto, marked as Exhibit "A" and made a part hereof, and statements and representations made by Plaintiff to the said Joe Lotz) at all of the times and upon each of the occasions alleged in the Complaint of Plaintiff on file herein the said Joe Lotz was authorized and empowered by Plaintiff to receive and receipt for all of the funds referred to in the said Complaint of Plaintiff and to endorse the checks therein set forth.

Second Affirmative Defense

As a further separate and Second Affirmative Defense to the Complaint of Plaintiff on file herein, Defendant avers as follows, to-wit:

I.

That at all the times alleged and upon each of the occasions referred to in the complaint of Plain-

tiff on file herein and pursuant to an agreement in writing between Plaintiff and the said Joe Lotz, a copy of which, entitled "Agency Agreement", is attached hereto and made a part hereof, the said Joe Lotz therein referred to was the duly authorized and acting general agent of Plaintiff and as such general agent empowered, authorized and required to collect, receive and receipt for premiums and to do everything necessary or proper and usual in the ordering course of business for effecting the purpose of the agency.

II.

That pursuant to the said Agency Agreement, a copy of which is attached hereto and made a part hereof, the said Joe Lotz was authorized and empowered to collect and hold premiums on business written for the Plaintiff for the period of sixty (60) days after the end of the month in which the business was written, and the said Joe Lotz was required by the aforementioned "Agency Agreement" to hold premiums received by the said Joe Lotz as the trustee for the Plaintiff.

III.

That each of the checks referred to in the Complaint of Plaintiff on file herein and the funds represented thereby were delivered to the said Joe Lotz as the general agent of Plaintiff and in payment of premiums on policies of insurance written and arranged for by the said Joe Lotz as general agent of the Plaintiff.

IV.

That in order to collect, receive and hold the premiums and to carry out his duties and obligations as such general agent and trustee of Plaintiff it was necessary, proper, usual and in the ordinary course of business for effecting the purpose of such agency to endorse each of the checks referred to in the Complaint of Plaintiff on file herein.

Third Affirmative Defense

As a further separate and Third Affirmative Defense to the Complaint of Plaintiff on file herein, Defendant avers as follows, to-wit:

I.

That at all of the times alleged and upon each of the occasions referred to in the Complaint of Plaintiff on file herein the said Joe Lotz, with the knowledge, consent and authority of Plaintiff, did represent and hold himself out as having authority to receive and endorse in the name of Plaintiff checks made payable to Plaintiff in payment of premiums on policies written by Joe Lotz as the general agent of and for Plaintiff, pursuant to said "Agency Agreement", a copy of which is attached hereto, and Defendant had no actual knowledge or notice that the said Joe Lotz did not have authority, if such be the fact, to endorse in the name of Plaintiff checks made payable to Plaintiff.

Fourth Affirmative Defense

As a further separate and Fourth Affirmative De-

fense to the Complaint of Plaintiff on file herein, Defendant avers as follows, to-wit:

I.

That on or about the first day of September, 1951 Plaintiff and the said Joe Lotz referred to in the Complaint of Plaintiff on file herein entered into an agreement entitled "Agency Agreement", a copy of which is attached hereto, marked Exhibit "A" and made a part hereof.

II.

That at all of the times alleged and upon each of the occasions referred to in the Complaint of Plaintiff on file herein, the said Joe Lotz, with the knowledge, consent and authority of Plaintiff, did represent and hold himself out as having authority to use and employ the premiums paid to and collected by him in order to carry out his business of being the general agent of Plaintiff in performing the matters and things contemplated and undertaken pursuant to the said "Agency Agreement", a copy of which is attached hereto.

III.

That pursuant to the aforesaid authorized representation and holding out the said Joe Lotz had ostensible authority to endorse the checks referred to and specified in the Complaint of Plaintiff, and the power to so endorse was a necessary and reasonable power to effectuate the above-mentioned authority to use and employ premiums paid to and collected by him.

IV.

That Defendant had no actual knowledge or notice that the said Joe Lotz did not have authority, if such be the fact, to use and employ the premiums paid to and collected by him in order to carry out his business of being the general agent of Plaintiff in performing the matters and things contemplated and undertaken pursuant to said "Agency Agreement", a copy of which is attached hereto.

Fifth Affirmative Defense

As a further separate and Fifth Affirmative Defense to the complaint of Plaintiff on file herein, Defendant avers as follows, to-wit:

I.

That Plaintiff is estopped from claiming and asserting that Joe Lotz had no authority to endorse the checks referred to in the Complaint of Plaintiff on file herein by reason of the following facts and circumstances, to-wit:

(a) That on or about the 1st day of September, 1951, Plaintiff and the said Joe Lotz entered into an agreement in writing entitled "Agency Agreement, a copy of which is attached hereto and marked as Exhibit "A" and made a part hereof.

(b) That at all times Plaintiff did know and consent and did so notify and instruct the said Joe Lotz to use and employ and have access to the premiums paid to and collected by him in order to conduct and carry out the business of being the general agent of Plaintiff and in performing the

matters and things contemplated and undertaken pursuant to the said "Agency Agreement".

(c) That at all times since the Plaintiff and the said Joe Lotz entered into the said "Agency Agreement", Plaintiff knew and had actual knowledge of the fact that the said Joe Lotz was receiving and endorsing in the name of Plaintiff checks made payable to Plaintiff in payment of premiums on policies written by the said Joe Lotz as the general agent for Plaintiff, pursuant to said "Agency Agreement".

(d) That on occasions Plaintiff has stated and acknowledged that the said Joe Lotz had authority from Plaintiff to receive and endorse in the name of Plaintiff checks made payable to Plaintiff in payment of premiums on policies written by the said Joe Lotz as the general agent for Plaintiff pursuant to said "Agency Agreement".

(e) That Plaintiff knew that the said Joe Lotz did represent to Defendant and to others that he was authorized and had the authority to receive and endorse checks in the name of Plaintiff made payable to Plaintiff in payment of premiums on policies written by the said Joe Lotz as the general agent for Plaintiff pursuant to said "Agency Agreement".

(f) That Plaintiff knew that the said Joe Lotz was receiving and endorsing checks in the name of Plaintiff, made payable to Plaintiff in payment of premiums on policies written by the said Joe Lotz as the agent for Plaintiff, pursuant to said "Agency Agreement" and depositing the same in a trustee account with Defendant and notwithstanding that Plaintiff knew of the same, Plaintiff failed and re-

fused to inform or otherwise advise Defendant that the said Joe Lotz had no authority, if such be the fact, to endorse the same as alleged in the Complaint on file herein.

Sixth Affirmative Defense

As a further separate and Sixth Affirmative Defense to the Complaint of Plaintiff on file herein, Defendant avers as follows, to-wit:

I.

That Defendant is informed and believes and upon such information and belief alleges the fact to be that Plaintiff has received each and all of the sums represented by and referred to in each of the checks referred to and specified in the Complaint of Plaintiff on file herein.

Seventh Affirmative Defense

As a further separate and Seventh Affirmative Defense to the Complaint of Plaintiff on file herein, Defendant avers as follows, to-wit:

I.

That on or about the 27th day of November, 1951, in order to secure and effect payments to Plaintiff of the sums referred to in the Complaint of Plaintiff on file herein, and in particular the proceeds of the checks described and specified therein, the said Joe Lotz referred to in the Complaint of Plaintiff on file herein, did execute and deliver to Plaintiff the power of attorney and assignment in the

form of the exhibits attached hereto, marked as Exhibits "B" and "C", respectively, and made a part hereof, whereby and as a result of which Defendant is informed and believes and upon such information and belief alleges the fact to be that Plaintiff has received money and other things of value equal to or in excess of the indebtedness referred to in the Complaint of Plaintiff on file herein, and in particular equal to or in excess of sums and proceeds from the checks specified therein.

Eighth Affirmative Defense

As a further separate and Eighth Affirmative Defense to the Complaint of Plaintiff on file herein, Defendant avers as follows, to-wit:

I.

That on or about the 1st day of September, 1951, Plaintiff and the said Joe Lotz referred to in the Complaint of Plaintiff on file herein entered into an agreement in writing entitled "Agency Agreement", a copy of which is attached hereto, marked as Exhibit "A" and made a part hereof.

II.

That pursuant to the said "Agency Agreement" the said Joe Lotz had and was possessed of an interest in the funds and proceeds represented by each of the checks referred to and specified in the Complaint, and Defendant is informed and believes and upon such information and belief alleges the fact to be that Plaintiff is not the sole owner thereof.

Wherefore, Defendant prays that Plaintiff take nothing by its Complaint on file herein and that Defendant have judgment against Plaintiff for its costs of suit incurred herein and for such other and further relief as to the Court may seem meet and proper in the premises.

SEVERSON & McCALLUM,
/s/ By ALMON B. McCALLUM,
Attorneys for Defendant
WORTHINGTON, PARK &
WORTHINGTON,
/s/ By WM. WORTHINGTON,
Attorneys for Defendant

Acknowledgment of Service attached.

[Endorsed]: Filed May 5, 1952.

[Title of District Court and Cause No. 31496.]

ANSWER

Defendant, Ralph L. Smead, for Answer to plaintiff's Complaint on file herein, admits, denies, and alleges as follows:

I.

As to Paragraph I thereof, this defendant admits he is a resident of the State of California. Admits employment by the defendant, Joseph Lotz, and the defendant, The American Plan Corporation, but that said employment by The American Plan Corporation occurred at times other than alleged in said complaint. Denies he was at any time employed by the American Fidelity and Casualty Company, Inc.

As to all other allegations contained in said paragraph, this defendant alleges he is without knowledge or information sufficient to form a belief as to the truth thereof.

II.

As to Paragraphs II, III, and IV thereof, this defendant alleges that he is without information sufficient to form a belief as to the truth of the allegations contained therein.

III.

Denies each and every allegation contained in Paragraphs V, VI, VII, IX, and X thereof.

IV.

As to Paragraph VIII this defendant admits that plaintiff did terminate the defendant Lotz' Agency Agreement. Denies each and every other allegation therein contained.

Wherefore, this defendant prays that plaintiff take nothing by its complaint and that he be allowed costs incurred.

/s/ BYRON L. DUSKY,

Attorney for Defendant Ralph L.
Smead

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 14, 1952.

[Note: Answer of Defendant Joseph Lotz in Action numbered 31496 has already been printed in Appeal No. 13756 in the United States Court of Appeals for the Ninth Circuit.]

[Title of District Court and Cause No. 31496.]

ANSWER OF DEFENDANTS AMERICAN
FIDELITY AND CASUALTY COMPANY,
INC. a corporation, and THE AMERICAN
PLAN CORPORATION, a corporation, TO
COMPLAINT; and COUNTERCLAIMS

Come Now the Defendants American Fidelity and Casualty Company, Inc., a corporation, (hereinafter called "American Fidelity") and The American Plan Corporation, a corporation, (hereinafter called "American Plan"), referred to hereinafter as "Defendants", and in answer to the complaint herein, admit, deny and allege as follows:

I.

Admit that plaintiff is an insurance corporation organized under the laws of the State of Illinois. Answering the allegations beginning with the word "defendant", line 27, page 1, and ending with the word "New York", line 11, page 2, Defendants admit the allegations therein contained, except that Defendants deny that American Plan is or was the manager of any of the business of American Fidelity except its United States automobile physical damage insurance business, and deny that defendant Mark Hart is or has ever been president of American Fidelity, and deny that defendants L. Sudekum and H. Arthur Will, (sued herein as "John Will"), are, or that either of them is, a resident of the State of New York.

Answering the allegations beginning with the word "plaintiff," lines 12 and 13, page 2, and ending with the word "therein", line 22, page 2, Defendants state that they have no knowledge or information sufficient to form a belief as to the truth of any of the averments contained in said allegations.

Answering the allegations beginning with the word "Defendant", line 22, page 2, and ending with the word "California", line 25, page 2, Defendants state that they have no knowledge or information sufficient to form a belief as to the truth of the averments that defendant Ralph L. Smead is and at all times mentioned in the Complaint has been an employee of defendants Lotz and that he is a resident of the State of California, or of any of said averments. Further answering said allegations, Defendants admit that Ralph L. Smead now is, and, since January 22, 1952, has been an employee of American Plan, and except as so admitted or denied, Defendants deny each and every of said allegations.

II.

Answering the allegations of paragraph II beginning with the word "On", line 28, page 2, and ending with the word "plaintiff", line 31, page 2, and beginning with the words "and on and after", lines 2 and 3, page 3 and ending with the figure "1952", line 5, page 3, Defendants state that they have no knowledge or information sufficient to form a belief as to the truth of any of the averments contained in said allegations.

Answering the allegations beginning with the word "On", line 31, page 2, and ending with the word "Fidelity", line 2, page 3, Defendants allege that on or about November 27, 1950, American Fidelity appointed defendant Lotz its agent for the State of California with power to accept proposals for insurance covering such automobile risks as American Fidelity might authorize to be insured, and to charge the premiums for such proposals, and to collect premiums on insurance tendered by defendant Lotz to and accepted by American Fidelity, and subject to approval by American Fidelity to adjust losses, and defendant Lotz as such agent thereafter procured insurance for and on behalf of American Fidelity, and except as herein alleged Defendants deny each and every of said allegations.

Answering the allegations beginning with the word "Defendant", line 5, page 3, and ending with the figure "1951", line 13, page 3, Defendants allege that defendant Lotz remained the agent of American Fidelity with the powers hereinabove specified until on or about August 22, 1951, and except as herein alleged Defendants deny each and every of said allegations.

III.

Answering the allegations of paragraph III, Defendants allege that on or about August 1, 1951 defendant Lotz was indebted to American Fidelity in the sum of approximately \$205,111.95, rather than the amount alleged in the complaint. Defendants state that they have no knowledge or

information sufficient to form a belief as to the truth of the allegation that defendant Lotz was insolvent on or about August 31, 1951 or at any other date. Except as so alleged and denied, Defendants deny each and every of said allegations, and further specifically deny that Defendants have known at all times or at any time that defendant Lotz was insolvent.

IV.

Answering the allegations of paragraphs IV, V and VI, Defendants deny each and every allegation therein contained.

V.

Answering the allegations of sub-section (a) of paragraph VII, Defendants deny each and every allegation therein contained.

VI.

Answering the allegations of sub-section (b) of paragraph VII, Defendants admit the execution of the letter Exhibit 1 to the Complaint and the agreement Exhibit 2 thereto, and in that respect allege that both said letter and agreement were executed on the same date, namely on or about August 22, 1951, and that the date August 17, 1951 on the letter Exhibit 1 was due to an error, and except as herein admitted and alleged deny each and every of said allegations.

VII.

Answering the allegations of sub-section (c) of paragraph VII, Defendants deny each and every of said allegations, and further specifically deny

that Defendants diverted from plaintiff at any time or at all the sum of \$151,781.91 or any other amount.

VIII.

Answering the allegations of sub-section (d) of paragraph VII, Defendants allege that on or about November 1, 1951, American Plan and plaintiff entered into an agreement under the terms of which certain automobile insurance policies, carrying the aggregate unexpired premiums of approximately \$61,016.00, which policies had been written by American Fidelity through defendant Lotz as its agent, were to be cancelled forthwith and said policies were to be rewritten at once by plaintiff. Except as herein alleged, Defendants deny each and every of said allegations.

IX.

Answering the allegations of sub-section (e) of paragraph VII, Defendants deny each and every of said allegations, and specifically deny that plaintiff has been damaged in the sum of \$84,300.00 or in any other amount.

X.

Further answering the allegations of paragraph VII, Defendants deny that the plan or conspiracy therein referred or any such plan or conspiracy ever existed or was carried out.

XI.

Answering the allegations of paragraph VIII, Defendants, while at all times denying the con-

spiracy, state that they have no knowledge or information sufficient to form a belief as to the truth of the averments that defendant Lotz was insolvent on or about December 1, 1951 and that plaintiff learned for the first time of defendant Lotz' insolvency on or about December 1, 1951, and that defendant Lotz is wholly unable to pay plaintiff any part of his indebtedness to plaintiff, or of any of said averments. Defendants further allege that they first learned of the amount of plaintiff's demands on or about March 31, 1952 and that Defendants then refused to pay to plaintiff the sum demanded or any portion thereof. Except as herein denied and alleged, Defendants deny each and every allegation therein contained.

XII.

Answering the allegations of paragraph IX, Defendants deny each and every of said allegations, and especially deny that plaintiff has been damaged in the sum of \$297,097.91 or in any sum at all.

XIII.

Answering the allegations of paragraph X, Defendants deny each and every of said allegations, and especially deny that plaintiff has been damaged in the sum of \$50,000 or in any sum at all.

Wherefore Defendants pray as hereinafter set forth.

As and for a Separate and Further Defense, Defendants allege, on information and belief:

XIV.

Plaintiff claims that on or about December 26, 1951, defendant Lotz was indebted to plaintiff in a sum exceeding Four Hundred Thousand Dollars (\$400,000.00). On or about that date defendant Lotz submitted to plaintiff an offer to liquidate said indebtedness, which offer, if it had been accepted by plaintiff, would have reduced the indebtedness of defendant Lotz to plaintiff to approximately \$32,500.00. Plaintiff intentionally and wilfully omitted to accept said offer, and said omission is the proximate cause of plaintiff's loss, if any there was.

First Counter-Claim

As and for a Separate and Further Defense, and as a First Counter-Claim, Defendants allege:

XV.

During all the times herein mentioned, American Fidelity has been, and now is, an insurance corporation organized under the laws of the State of Virginia and doing an insurance business in the State of California and in other states. During all the times herein mentioned, American Plan has been, and now is, a corporation organized under the laws of the State of New York and manager of the United States automobile physical damage insurance business of American Fidelity. During all the times herein mentioned, plaintiff was, and now is, an insurance corporation organized under the laws of the State of Illinois and doing business in the State of California.

XVI.

Defendant Lotz acted as the agent of American Fidelity as above stated for the period from November 27, 1950, to August 22, 1951, and during that period and for some time thereafter Lotz collected premiums on insurance written by American Fidelity through Lotz as such agent. During that period Lotz was also agent for plaintiff as above stated and collected premiums on insurance written by plaintiff through him as such agent.

XVII.

In its complaint herein plaintiff alleges that some monies collected by Lotz as premiums on insurance written for plaintiff were wrongfully paid by Lotz to American Plan as agent for American Fidelity. American Plan and American Fidelity deny such fact. If, however, it should be determined in this action that any monies belonging to plaintiff have been paid to Defendants, or either of them, under circumstances under which Defendants, or either of them, should be liable to plaintiff therefor, then Defendants allege that since the time when defendant Lotz became the agent of American Fidelity on November 27, 1950, premiums in substantial amounts collected by him on insurance written for American Fidelity were paid by him to plaintiff herein, and that in making such payments to plaintiff Lotz was acting as the agent of plaintiff and in the course of such agency. Defendants do not at present know the amount of said monies and they therefore ask that when said

amount shall have been determined, it be set off against any monies belonging to plaintiff which may have been paid to Defendants and for which Defendants may be liable to plaintiff.

Second Counter-Claim

As and for a Separate and Further Defense, and as a Second Counter-Claim, American Fidelity alleges:

XVIII.

During all the times herein mentioned, plaintiff was and now is an insurance corporation organized under the laws of the State of Illinois and doing an insurance business in the State of California.

XIX.

During all the times herein mentioned, American Fidelity has been, and now is, an insurance corporation organized under the laws of the State of Virginia and doing an insurance business in more than forty states of the United States, including the State of California. In some of these states American Fidelity has been so engaged for more than twenty-five years. American Fidelity has thereby built up good will with the insuring public, and with insurance brokers and agents, and with commissioners of insurance of various states, which good will is a valuable asset of American Fidelity.

XX.

During all the times herein mentioned defendant

Lotz was the general agent of plaintiff for the State of California.

XXI.

On or about November 1, 1951, American Fidelity entered into an agreement with plaintiff whereby said parties agreed that certain automobile physical damage insurance policies carrying aggregate unexpired premiums of approximately \$61,016.00, which had been written by American Fidelity in California, were to be forthwith cancelled and said policies at once rewritten by plaintiff with identical coverage, and that such cancellation and rewriting were to be effective as of the beginning of said policy period. For that purpose said parties agreed that defendant Lotz would at once prepare and send to the assureds under said policies of American Fidelity notices that said policies had been cancelled, as above stated, and that the same had been rewritten by plaintiff, as above stated, and that policies of plaintiff evidencing such insurance by plaintiff would be forthwith forwarded to such assureds.

XXII.

Pursuant to said agreement, defendant Lotz prepared said notices of cancellation and of rewriting of insurance, and on or about November 7, 1951, sent such notices to the assureds under said policies, but plaintiff, in violation of its agreement, refused and failed to send its policies to such assureds until on or about December 31, 1951.

XXIII.

Between the time that such notices of cancellation were sent out and the time the assureds under said policies of American Fidelity received their new policies from plaintiff as above stated, numerous communications from such assureds were sent to the office of defendant Lotz, which communications contained claims for losses under said policies and notices of cancellation thereof and requests for return of premiums and requests for substitution of automobiles and various other matters in respect of such policies. Said communications were ignored by plaintiff during said period.

XXIV.

The failure of receipt by such assureds of their new policies during such period after receipt of notice of cancellation of their American Fidelity policies, and their said failure to procure prompt responses to their communications and prompt action in respect thereto, caused grave dissatisfaction with American Fidelity among such assureds, and as a result thereof many of such assureds complained of said facts to the Commissioner of Insurance of California, and various complaints of such neglect were made by assureds to various other persons including persons in the insurance business in California.

XXV.

American Fidelity has at all times fully per-

formed all the terms and conditions of said agreement on its part to be performed.

XXVI.

As a direct and proximate result of plaintiff's said breach of its agreement, American Fidelity has suffered loss of business and injury to its reputation and good will and other damage and has thereby been damaged in the sum of One Hundred Fifty Thousand Dollars (\$150,000.00).

Third Counter-Claim

As and for a Separate and Further Defense, and as a Third Counter-Claim, Defendants allege:

XXVII.

During all the times herein mentioned, plaintiff was and now is an insurance corporation organized under the laws of the State of Illinois and doing an insurance business in the State of California.

XXVIII.

During all the times herein mentioned, American Fidelity has been, and now is, an insurance corporation organized under the laws of the State of Virginia and doing an insurance business in more than forty states of the United States, including the State of California. In some of these states American Fidelity has been so engaged for more than twenty-five years. During all the times herein men-

tioned, American Plan has been, and now is, a corporation organized under the laws of the State of New York and since about December 1, 1949, manager of the United States automobile physical damage insurance business of American Fidelity. Defendants have thereby built up good will with the insuring public, and with insurance brokers and agents, and with commissioners of insurance of various states, which good will is a valuable asset of Defendants, and of each of them.

XXIX.

On several occasions since approximately December 1, 1951, plaintiff, acting by its president and other authorized agents whose names are at present unknown to Defendants, made the following statements to representatives of other companies engaged in the insurance business in the United States and to various other persons: (1) That Defendants by concealments and misrepresentations, had induced plaintiff to enter into an agreement to re-write certain insurance, which insurance had previously been written by American Fidelity, and that Defendants were thereby guilty of dishonorable practices; (2) That Defendants had improperly induced and compelled defendant Lotz as an insurance agent to divert from the true owner or owners thereof certain funds which were in his possession as such agent and to convert such funds to the use of other than such true owner or owners thereof; and (3) That Defendants and their officers and representatives were guilty of dishonest business prac-

tices. Such statements were made with the intent to injure Defendants in their said businesses.

XXX.

Said statements were, and each of them was, false and defamatory.

XXXI.

By reason of said false statements, each of the Defendants has been greatly injured in its business and reputation, and in its relations with its customers and the insuring public, and with insurance brokers and agents, and with commissioners of insurance of various states, to the damage of each of said Defendants in the sum of Five Hundred Thousand Dollars (\$500,000.00).

Wherefore Defendants pray:

1. That plaintiff take nothing by its complaint;
2. That Defendant, The American Plan Corporation, have judgment against plaintiff in the sum of One Hundred Fifty Thousand Dollars (\$150,000.00);
3. That Defendants, American Fidelity and Casualty Company, Inc. and The American Plan Corporation, each have judgment against plaintiff in the sum of Five Hundred Thousand Dollars (\$500,000.00);
4. That Defendants have judgment against plain-

tiff for their costs of suit and for such other and further relief as may be proper in the premises.

Dated: June 30, 1952.

/s/ HAROLD R. McKINNON,
/s/ BRONSON, BRONSON &
McKINNON,

Attorneys for Defendants, American Fidelity and Casualty Company, Inc. and The American Plan Corporation.

Acknowledgment of Service attached.

[Endorsed]: Filed June 30, 1952.

[Title of District Court and Cause No. 31496.]

COMPLAINT IN INTERVENTION

Comes Now, The Anglo California National Bank of San Francisco, a national banking association, plaintiff in intervention, and by leave of Court first had and obtained, and for a cause of action against defendants above-named, and each of them, alleges as follows, to-wit:

I.

That at all times herein mentioned The Anglo California National Bank of San Francisco (hereinafter called "Anglo Bank"), plaintiff in intervention, was and now is a national banking association organized and existing under the laws of the United States of America and authorized to transact, and

transacting, a general banking business in the State of California, with its principal place of business in the City and County of San Francisco, State of California.

II.

That at all times herein mentioned Mid-States Insurance Company (hereinafter called "Mid-States"), plaintiff above named, was and now is a corporation organized and existing under the laws of the State of Illinois.

III.

That at all times herein mentioned American Fidelity and Casualty Company, Inc. (hereinafter called "American Fidelity"), one of the defendants, was and now is an insurance corporation organized and existing under the laws of the State of Virginia and doing business in the State of California.

IV.

That at all times herein mentioned The American Plan Corporation (hereinafter called "American Plan"), one of the defendants, was and now is a corporation organized and existing under the laws of the State of New York, and at all times herein mentioned was and now is the manager of American Fidelity.

V.

That at all times herein mentioned Mark Hart, one of the defendants, was and now is the President of American Fidelity and of American Plan, and was and now is a resident of the State of New York.

VI.

That at all times herein mentioned L. Sudekum, one of the defendants, was and now is Executive Vice-President of American Plan, and a resident of the State of New York, that Anglo Bank does not know the full first name of said defendant and prays leave to amend this complaint in intervention when the same is ascertained.

VII.

That at all times herein mentioned John Will, one of the defendants, was and now is Treasurer of American Plan and a resident of the State of New York; that Anglo Bank does not know the full first name of said Defendant and prays leave to amend this complaint in intervention when the same is ascertained.

VIII.

That at all times herein mentioned the defendants First Doe, Second Doe, Third Doe, Fourth Doe, Fifth Doe and Sixth Doe, were and now are directors and/or officers and/or agents of American Fidelity and/or American Plan, and residents of the State of New York. Anglo Bank does not know the true names of said defendants and prays leave to amend this complaint in intervention when the same are ascertained.

IX.

That at all times herein mentioned Joseph Lotz, one of the defendants, was and now is a resident of the State of California, and at all times herein mentioned was a licensed insurance agent therein

and a duly appointed General Agent of Mid-States and of American Fidelity for the State of California.

X.

That at all times herein mentioned Ralph L. Smead, one of the defendants, was and now is a resident of the State of California, and at all times herein mentioned was an employee of American Fidelity, American Plan and Joseph Lotz.

XI.

That the matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

XII.

That Anglo Bank is informed and believes, and upon such information and belief alleges the fact to be, that on or about May 15, 1947 Mid-States appointed Joseph Lotz its General Agent for the State of California; that the said Joseph Lotz thereafter procured insurance business for and on behalf of Mid-States; and that the said Joseph Lotz remained and continued to be the General Agent of Mid-States in the State of California until January 21, 1952.

XIII.

That Anglo Bank is informed and believes, and upon such information and belief alleges the fact to be, that on or about November 7, 1950 American Fidelity appointed Joseph Lotz its General Agent for the State of California; that the said Joseph Lotz thereafter procured insurance business for

and on behalf of American Fidelity; that the said Joseph Lotz remained and continued to be the General Agent of American Fidelity for the State of California until on or about August 17, 1951, when his authority as such was terminated by American Fidelity, and that American Fidelity for its own purposes did not file the Notice of Termination of Appointment with the Insurance Commissioner of the State of California, as required by the California Insurance Code until on or about October 31, 1951.

XIV.

That Anglo Bank is informed and believes, and upon such information and belief alleges the fact to be, that on or about August 1, 1951 Joseph Lotz was indebted to American Fidelity in the approximate sum of One Hundred Ninety Thousand Nine Hundred Eighty-four Dollars (\$190,984.00); that on said date Joseph Lotz was insolvent, and ever since that date has been insolvent, and that each of the defendants named above have at all of said times known that Joseph Lotz was insolvent.

XV.

That Anglo Bank is informed and believes, and upon such information and belief alleges the fact to be, that on or about August 1, 1951 the defendants above-named, other than the defendants Joseph Lotz and Ralph L. Smead, conceived and prepared a plan, (a) to induce and cause Joseph Lotz to pay to American Fidelity and American Plan funds received by him as premiums on insurance business

procured by him for and on behalf of Mid-States; (b) to apply such funds so received from Joseph Lotz to the repayment of the indebtedness of Joseph Lotz to American Fidelity, notwithstanding that said funds were, and were known to said defendants to be, funds received by Joseph Lotz as premiums on insurance business procured by him on behalf of Mid-States; (c) to reduce and cancel the balance of the indebtedness of Joseph Lotz to American Fidelity by the cancellation of outstanding insurance business procured by Joseph Lotz for and on behalf of American Fidelity and having such insurance rewritten by Joseph Lotz for Mid-States, notwithstanding that said defendants knew full-well that Joseph Lotz was wholly unable to pay Mid-States premiums on said rewritten insurance and that Mid-States and Anglo Bank were not aware of the insolvency and inability of Joseph Lotz to pay Mid-States the premiums on said insurance to be so rewritten; and (d) to take all action necessary to conceal from Mid-States and Anglo Bank the fact of the insolvency and inability of Joseph Lotz to pay said premiums.

XVI.

That Anglo Bank is informed and believes, and upon such information and belief alleges the fact to be, that pursuant to the said plan so conceived and prepared by the defendants other than Joseph Lotz and Ralph L. Smead, the former caused Joseph Lotz and Ralph L. Smead to meet with them on or about August 13, 1951, at which meeting the plan conceived and prepared by the defendants

other than Joseph Lotz and Ralph L. Smead was communicated to and discussed with the said Joseph Lotz and Ralph L. Smead; that thereupon all of the defendants, and for the purpose of defrauding and deceiving Mid-States and Anglo Bank, and enriching American Fidelity and American Plan, agreed among themselves that Joseph Lotz would pay to American Fidelity and/or American Plan all funds received by him as premiums for insurance business procured by Joseph Lotz for and on behalf of Mid-States; that said defendants also conspired and agreed among themselves to take such action as might be necessary to conceal insolvency of Joseph Lotz so that Joseph Lotz might continue to write insurance for Mid-States, including the re-writing of insurance on behalf of Mid-States in substitution for insurance previously written by Joseph Lotz for and on behalf of American Fidelity, which was to be cancelled by American Fidelity in order to reduce the indebtedness of Joseph Lotz to it; and that said defendants further conspired and agreed among themselves and for the benefit of American Fidelity and American Plan that Joseph Lotz would write excessively large amounts of insurance for Mid-States, regardless of the nature of the risks involved and at high advance premiums to sub-agents, so that the defendants would be enabled to divert to American Fidelity and American Plan such premiums as might be collected by Joseph Lotz on insurance business procured by him for and on behalf of Mid-States.

XVII.

That on or about the 31st day of August, 1951, Joseph Lotz opened a commercial account with Anglo Bank at its office at 1450 Broadway, Oakland, California, entitled "Joe Lotz, Trustee" and thereafter proceeded to endorse and deposit therein various checks made payable to the order of Mid-States, which Joseph Lotz represented and warranted to Anglo Bank he was authorized, and had authority, to endorse on behalf of Mid-States, among which were the following drawn by Public Service Insurance Co. on Pacific National Bank of San Francisco:

Check No.	Date of Check	Amount	Date of Deposit
3590	Sept. 7, 1951	\$ 5,547.25	Sept. 11, 1951
3611	Sept. 14, 1951	67,500.00	Sept. 18, 1951
3628	Sept. 24, 1951	11,250.00	Sept. 25, 1951
3660	Sept. 28, 1951	3,750.00	Oct. 1, 1951
3699	Oct. 15, 1951	5,089.44	Oct. 16, 1951

and among which was the following drawn by George R. Fulmore on Bank of America, National Trust and Savings Association:

Check No.	Date of Check	Amount	Date of Deposit
980	Nov. 16, 1951	\$ 1,484.65	Nov. 20, 1951

and among which were the following drawn by Jackson Motor Sales on the Anglo California National Bank, Chico, California:

Check No.	Date of Check	Amount	Date of Deposit
4868	Oct. 13, 1951	\$ 1,000.00	Oct. 13, 1951
4902	Nov. 10, 1951	800.00	Nov. 15, 1951

and Mid-States in its action against Anglo Bank, referred to hereinafter in Paragraph XIX hereof, has alleged that there may be other checks made

payable to Mid-States which may have been endorsed and deposited by Joseph Lotz with Anglo Bank.

XVIII.

That Anglo Bank is informed and believes, and upon such information and belief alleges the fact to be, that all of said defendants carried out the plan and conspiracy hereinabove referred to in the following manner:

(a) At the direction and instigation of the defendants other than Joseph Lotz, and by agreement with all of the defendants including Joseph Lotz, Joseph Lotz fraudulently concealed from Mid-States and Anglo Bank, (1) that he was insolvent; (2) that he had agreed to divert to American Fidelity and American Plan all funds and premiums held or to be received by him on insurance procured by him for and on behalf of Mid-States; (3) that he had conspired and agreed with the other defendants in the manner aforesaid; (4) that the re-writing of insurance by him on behalf of Mid-States in substitution for insurance previously written by him for American Fidelity was for the sole purpose of enabling American Fidelity to reduce the amount of the otherwise uncollectible indebtedness to it from Joseph Lotz at the expense of Mid-States; (5) that new insurance being written by him for Mid-States would be and was extraordinarily large and excessive in amount on poor risks and with high advance premiums to sub-agents; (6) that he had surrendered to American Fidelity and American Plan, acting through defendants Mark Hart

and Ralph L. Smead, full control and authority over his insurance agency and finances; and (7) that he surrendered and paid over to American Fidelity and American Plan, acting through defendants Mark Hart and Ralph L. Smead, the sums received by him from Public Service Insurance Co., George R. Fulmore and Jackson Motor Sales, pursuant to the checks endorsed and deposited by him, as alleged in Paragraph XVII hereinabove; that all of said defendants in addition to concealing the aforesaid acts for the purpose and intent and with the result of deceiving Mid-States and Anglo Bank so that Mid-States would not terminate Joseph Lotz' agency agreement and would consent to Joseph Lotz rewriting insurance in substitution for insurance previously written by him for American Fidelity and so that Joseph Lotz might continue to endorse and deposit checks made payable to Mid-States with Anglo Bank, affirmatively represented to Mid-States that the reason Joseph Lotz desired and intended to write more insurance for Mid-States and less for American Fidelity, and especially the reason for his rewriting for Mid-States insurance originally written for American Fidelity, was that he had requested American Fidelity to grant him more favorable terms which American Fidelity refused to do;

(b) On or about August 17, 1951, American Fidelity, American Plan, Joseph Lotz and Ralph L. Smead entered into an agreement whereby Ralph L. Smead was appointed the representative of American Fidelity and of American Plan and as

such was given full and complete control and authority over the financial affairs of Joseph Lotz and his insurance agency for the purpose of diverting to American Fidelity and American Plan all funds and premiums held or received by Joseph Lotz on insurance procured by him for and on behalf of Mid-States, and in particular sums to be and which were received by him from Public Service Insurance Co., George R. Fulmore and Jackson Motor Sales, pursuant to checks endorsed and deposited by him, as alleged in Paragraph XVII hereinabove; a true and correct copy of the letter from Mark Hart, as President of American Plan, to Ralph L. Smead, dated August 17, 1951, and a true and correct copy of Memorandum of Agreement among defendants American Fidelity, American Plan, Joseph Lotz and Ralph L. Smead, dated August 22, 1951, are attached hereto, marked Exhibits 1 and 2, respectively;

(c) On or about August 31, 1951, Joseph Lotz opened the aforesaid account with Anglo Bank, and proceeded to endorse and deposit therein checks payable to the order of Mid-States, and did represent and warrant to Anglo Bank that he was authorized and had authority to endorse the same on behalf of Mid-States;

(d) That during the months of September, October and November, 1951, while knowing that they were funds and premiums held or received by Joseph Lotz on insurance procured by him for and on behalf of Mid-States, diverted to and for the benefit of American Fidelity and American Plan

such of the funds received by Joseph Lotz from Public Service Insurance Co., George R. Fulmore and Jackson Motor Sales, and from such others, if any, because of checks made payable to Mid-States which may have been endorsed and deposited by Joseph Lotz with Anglo Bank, as referred to in Paragraph XVII hereof, which were not paid to or for the benefit of Mid-States;

(e) By November 1, 1951, by virtue of the diversion to American Fidelity and American Plan of funds and premiums held or received by Joseph Lotz on insurance procured by him for and on behalf of Mid-States and their application in reduction of the indebtedness of Joseph Lotz to American Fidelity, such indebtedness had been reduced to the sum of approximately \$61,016.00; on or about said date the defendants, acting through Joseph Lotz and Ralph L. Smead, caused insurance having a premium value of approximately \$61,016.00, which had originally been written by Joseph Lotz for American Fidelity and in respect of which the assureds thereunder had already paid the premiums, to be rewritten by Joseph Lotz for Mid-States.

XIX.

On the 28th day of February, 1952, Mid-States commenced an action in this court entitled "Mid-States Insurance Company, a corporation, Plaintiff, vs. The Anglo California National Bank of San Francisco, a national banking association, Defendant" and numbered 31311 on the records and files of this court, alleging therein that while Joseph

Lotz had authority to receive the checks referred to and specified in Paragraph XVII hereof, he had no authority to endorse them for Mid-States, and prays for a judgment of this court against Anglo Bank for the amount thereof, to-wit: \$99,021.10, with interest thereon at the rate of seven per cent (7%) per annum, and costs of suit incurred therein.

XX.

That at the times the said checks referred to in Paragraph XVII hereof were endorsed and deposited by Joseph Lotz, as aforesaid, Anglo Bank believed that he was authorized and had authority to endorse and deposit the same, and it was not until on or about the 10th day of January, 1952, that Anglo Bank was advised and informed by Mid-States that Joseph Lotz had no authority to endorse checks made payable to Mid-States; during the latter part of March, 1952, Anglo Bank for the first time was advised and informed of the aforesaid plan and conspiracy of defendants to defraud and deceive, and of the various acts done pursuant thereto, and until such time Anglo Bank had no knowledge, information or belief concerning the same: that at all of the times herein mentioned the defendants knew that Joseph Lotz was insolvent and unable to meet his obligations.

XXI.

That on the 28th day of April, 1952, Mid-States commenced an action in this court entitled "Mid-States Insurance Company, a corporation, Plaintiff, vs. American Fidelity and Casualty Company, Inc.,

a corporation; the American Plan Corporation, a corporation; Mark Hart; Joseph Lotz; Ralph L. Smead; L. Sudekum; John Will; First Doe; Second Doe; Third Doe; Fourth Doe; Fifth Doe, and Sixth Doe, Defendants'' numbered 31496 on the records and files of this court, and entitled "Complaint for Fraud," alleging therein the aforementioned plan and conspiracy of the defendants to defraud and deceive, and the various acts done pursuant thereto, and praying for a judgment of this court against defendants for the sum of \$297,097.91, and the further sum of \$50,000.00 as and for exemplary and punitive damages, and for costs of suit incurred therein.

XXII.

That Anglo Bank is informed and believes, and upon such information and belief alleges the fact to be, that there is included within and as a part of the aforesaid claim of Mid-States against defendants for \$297,097.91, as set forth in its said action numbered 31496 on the records and files of this court, the claim of Mid-States against Anglo Bank in the sum of \$99,021.10, as set forth in its said action numbered 31311 on the records and files of this court.

XXIII.

That should Mid-States prevail in its said action numbered 31311 on the records and files of this court and recover judgment against Anglo Bank, Anglo Bank will, as a result of the aforesaid plan and conspiracy of the defendants to defraud and deceive and the various acts done, permitted, di-

rected and suffered by the defendants pursuant thereto, be damaged to the extent of such sum as may be awarded Mid-States in connection with the checks described in Paragraph XVII hereof and because of the endorsement and use of the funds therefrom, as herein alleged.

XXIV.

In doing and permitting the things herein alleged defendants have been guilty of fraud and deceit and have been actuated by malice towards Anglo Bank, and by reason thereof Anglo Bank demands exemplary and punitive damages against defendants in the sum of \$15,000.00.

Wherefore, Anglo Bank prays judgment against defendants, and each of them, for all sums that may be adjudged against Anglo Bank in favor of Mid-States; and for the sum of \$15,000.00 as exemplary and punitive damages; and for its costs of suit incurred herein, and for such other and further relief as may be meet and proper in the premises.

SEVERSON & McCALLUM,
ALMON B. McCALLUM,

/s/ By ALMON McCALLUM
WORTHINGTON, PARK &
WORTHINGTON

/s/ By W. F. WORTHINGTON,
Attorneys for Plaintiff in
Intervention.

Duly Verified.

[Endorsed]: Filed October 1, 1952.

[Title of District Court and Cause 31311.]

THIRD PARTY COMPLAINT

Comes Now, The Anglo California National Bank of San Francisco, a national banking association, defendant and third-party plaintiff, and for a cause of action against third-party defendants above named, and each of them, alleges as follows, to-wit:

I.

That at all times herein mentioned The Anglo California National Bank of San Francisco (hereinafter called "Anglo Bank"), defendant and third-party plaintiff, was and now is a national banking association organized and existing under the laws of the United States of America and authorized to transact, and transacting, a general banking business in the State of California, with its principal place of business in the City and County of San Francisco, State of California.

II.

That at all times herein mentioned Mid-States Insurance Company (hereinafter called "Mid-States"), plaintiff above named, was and now is a corporation organized and existing under the laws of the State of Illinois. * * * * *

[Note: The balance of the Third Party Complaint is similar to the Complaint in Intervention in Case No. 31496 set out at pages 51-64 of this printed record.]

[Endorsed]: Filed October 1, 1952.

[Title of District Court and Cause 31311.]

ANSWER OF THIRD PARTY DEFENDANTS
AMERICAN FIDELITY AND CASUALTY
COMPANY, INC., a corporation, and THE
AMERICAN PLAN CORPORATION, a corporation, to THIRD PARTY COMPLAINT

Come Now Third Party Defendants American Fidelity and Casualty Company, Inc., a corporation (hereinafter called "American Fidelity"), and The American Plan Corporation, a corporation (hereinafter called "American Plan"), referred to hereinafter as "Third Party Defendants", and in answer to the Third Party Complaint herein, admit, deny and allege as follows:

I.

Answering the allegations of paragraph I, Third Party Defendants state that they have no knowledge or information sufficient to form a belief as to the truth of any of the averments contained in said paragraph.

* * * * *

[Note: Paragraphs II to XXIV, incl., of the Answer is the same as Answer of Defendants American Fidelity and Casualty Company and The American Plan Company to Complaint in Intervention set out at pages 82-88 of this printed record.]

As and for a Separate and Further Defense and as Counterclaims herein, Third Party Defendants allege:

XXV.

Third Party Defendants and Third Party Plaintiff have not been and are not in privity and no duty has been or is owed by Third Party Defendants to Third Party Plaintiff. The claim of Third Party Plaintiff against Third Party Defendants is conditioned on a recovery by plaintiff Mid-States Insurance Company against Third Party Plaintiff, and Third Party Plaintiff proceeds in the Third Party Complaint against Third Party Defendants as subrogee of Plaintiff Mid-States Insurance Company. The claim of Third Party Plaintiff, as such subrogee, against Third Party Defendants is subject to all defenses, set-offs and counterclaims which Third Party Defendants have against Mid-States Insurance Company.

In the action filed by Mid-States Insurance Company against Third Party Defendants and others in the above entitled court, bearing No. 31496, which action is referred to in the Third Party Complaint herein, Third Party Defendants have filed an Answer and Counterclaims to the Complaint of Plaintiff Mid-States Insurance Company therein. A copy of said Answer and Counterclaims is attached hereto, marked Exhibit "A" and hereby made a part of this pleading with the same effect as if the same and all the defenses and counterclaims contained in it were fully set forth herein, and Third Party Defendants hereby set up all said defenses and counterclaims herein in opposition to the claim of Third Party Plaintiff as well as to that of Plaintiff Mid-States Insurance Company.

As and for a Separate and Further Defense herein and as and for a defense against Plaintiff Mid-States Insurance Company, Third Party Defendants allege:

XXVI.

Third Party Defendants repeat and allege as if herein fully set forth everything contained in the Answer of The Anglo California Bank of San Francisco to the Complaint of Mid-States Insurance Company herein.

Wherefore Third Party Defendants pray that Third Party Plaintiff take nothing by the Third Party Complaint herein and that Third Party Defendants have judgment against Third Party Plaintiff for their costs of suit and for such other and further relief as to the Court may seem proper in the premises.

Dated: October 3, 1952.

/s/ HAROLD R. McKINNON

/s/ BRONSON, BRONSON &
McKINNON,

Attorneys for Third Party Defendants American Fidelity and Casualty Company, Inc. and The American Plan Corporation.

[Exhibit A—Answer of Defendants American Fidelity and Casualty Co. Inc. and The American Plan Corp. to Complaint; and Counterclaims is set out at pages 36-50 of this printed record.]

[Endorsed]: Filed October 9, 1952.

[Title of District Court and Cause 31311.]

ANSWER OF THIRD PARTY DEFENDANT
JOSEPH LOTZ TO THIRD PARTY
COMPLAINT

Now Comes Joseph Lotz, a Third Party Defendant in the above entitled cause, and for separate answer to the Third Party Complaint on file herein, admits, denies and alleges as follows:

I.

Answering the allegations of Paragraph I, Third Party Defendant states that he has no knowledge or information sufficient to form a belief as to the truth of any of the averments contained in said paragraph.

II.

Answering paragraph II, admits the allegations thereof.

III.

Answering paragraph III, admits the allegations thereof.

IV.

Answering paragraph IV, this Third Party Defendant states that he has no knowledge or information sufficient to form a belief as to the truth of any of the averments of said paragraph.

V.

Answering Paragraph V, admits the allegations thereof except this defendant has no knowledge or

information sufficient to form a belief as to the truth of whether Mark Hart is or ever has been President of the American Fidelity.

VI.

Answering paragraph VI, this Third Party Defendant states that he has no knowledge or information to form a belief as to the truth of any of the averments contained in said paragraph.

VII.

Answering paragraph VII, this Third Party Defendant states that he has no knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in said paragraph.

VIII.

Answering paragraph VIII, this Third Party Defendant states that he has no knowledge or information sufficient to form a belief as to the truth of any of the averments contained in said paragraph.

IX.

Answering paragraph IX, this Third Party Defendant alleges that on or about November 27, 1950, American Fidelity appointed this Third Party Defendant its agent for the State of California, with power to accept proposals for insurance covering such automobile risks as American Fidelity might authorize to be insured, and to charge the premiums for such proposals, and to collect premiums on insurance tendered by this Third Party Defend-

ant to and accepted by American Fidelity, and subject to approval by American Fidelity to adjust losses, and alleges that this Third Party Defendant remained such agent with the powers hereinabove specified until on or about August 21, 1951; denies all the other allegations regarding this Third Party Defendant's agency for American Fidelity.

Admits that at all times mentioned in said Third Party Complaint, he was a resident of the State of California.

X.

Answering paragraph X, admits the allegations thereof.

XI.

Answering paragraph XI, admits the allegations thereof.

XII.

Answering paragraph XII, this Third Party Defendant states that the Mid-States Insurance Company did, on May 15, 1947, appoint this Third Party Defendant its agent for the State of California, but denies that he was at any time formally appointed general agent for said Mid-States; admits all other averments contained in said paragraph.

XIII.

Answering paragraph XIII, alleges that on or about November 27, 1950, American Fidelity appointed Joseph Lotz, this Third Party Defendant, its agent for the State of California with the powers specified in paragraph IX of this Answer, and admits that Lotz as such agent thereafter procured

insurance business for and on behalf of American Fidelity, and alleges that Lotz remained the agent of American Fidelity with the powers specified in paragraph IX of this Answer until on or about August 22, 1951, and except as herein alleged or admitted, denies each and every of the allegations of paragraph XIII.

XIV.

Answering paragraph XIV, this Third Party Defendant alleges that he has no knowledge or information sufficient to form a belief as to the amount of said indebtedness, and as to the insolvency alleged in said paragraph, this defendant denies each and every averment thereof.

XXV.

Answering paragraph XV, denies each and every allegation thereof.

XVI.

Answering paragraph XVI, denies each and every allegation thereof.

XVII.

Answering paragraph XVII, this Third Party Defendant admits he had authority to endorse and deposit various checks made payable to the order of Mid-States, but that as to the amount, number and date thereof, he is without sufficient knowledge or information to form a belief as to the truth of the averments thereof.

XVIII.

Answering paragraph XVIII, this Third Party

Defendant denies each and every allegation contained in subparagraph (a) thereof;

With respect to the allegations of sub-paragraph (b), admits the execution of the letter Exhibit 1 to the Third Party Complaint and the agreement Exhibit 2 thereof, and in that respect alleges that both said letter and agreement were executed on the same date, namely on or about August 22, 1951, and that the date August 17, 1951, on the letter Exhibit 1 was due to an error, and except as herein admitted and alleged, denies each and every of said allegations;

With respect to the allegations of sub-paragraph (c), admits the allegations therein contained;

With respect to the allegations of sub-paragraph (d), denies each and every allegation therein contained;

With respect to the allegations of sub-paragraph (e), alleges that on or about November 1, 1951, American Plan and plaintiff entered into an agreement under the terms of which certain automobile insurance policies, carrying the aggregate unexpired premiums of approximately \$61,016.00, which policies had been written by American Fidelity through Joseph Lotz, this Third Party Defendant, as its agent, were to be cancelled forthwith and said policies were to be rewritten at once by plaintiff; and except as herein alleged, denies each and every of said allegations; and

Further answering paragraph XVIII, denies that the plan or conspiracy therein referred to or any

such plan or conspiracy ever existed or was carried out.

XIX.

Answering paragraph XIX, states that he has no knowledge or information sufficient to form a belief as to the truth of the averments thereof.

XX.

Answering paragraph XX, denies the existence of any such plan or conspiracy or any acts done pursuant to conspiracy, and except as thus denied, states that he has no knowledge or information sufficient to form a belief as to the truth of the averments of said paragraph.

XXI.

Answering paragraph XXI, admits the allegations thereof, except denies the existence of any such plan or conspiracy or any acts done pursuant to conspiracy.

XXII.

Answering paragraph XXII, states that he has no knowledge or information sufficient to form a belief as to the truth of the averments thereof.

XXIII.

Answering paragraph XXIII, denies each and every of the allegations thereof, and further denies the existence of any such plan or conspiracy or any acts done pursuant to conspiracy.

XXIV.

Answering paragraph XXIV, denies each and every of the allegations thereof, and especially denies that Third Party Plaintiff has been damaged in the sum of \$15,000.00, or in any amount at all.

Wherefore, this Third Party Defendant prays that the Third Party Plaintiff take nothing by the Third Party Complaint herein, and that this Third Party Defendant have judgment against Third Party Plaintiff for his costs of suit and for such other and further relief as to the Court may be meet and proper in the premises.

Dated this 20th day of December, 1952.

/s/ BYRON L. DUSKY,

Attorney for Third Party Defendant Joseph Lotz.

Duly Verified.

[Endorsed]: Filed December 23, 1952.

[Title of District Court and Cause 31311.]

ANSWER OF THIRD PARTY DEFENDANT
RALPH L. SMEAD TO THIRD PARTY
COMPLAINT

Now Comes Ralph L. Smead, a Third Party Defendant in the above entitled cause, and for separate answer to the Third Party Complaint on file herein, admits, denies and alleges as follows:

I.

Answering the allegations of paragraph I, Third

Party Defendant states that he has no knowledge or information sufficient to form a belief as to the truth of any of the averments contained in said paragraph.

II.

Answering paragraph II, admits the allegations thereof.

III.

Answering paragraph III, admits the allegations thereof.

IV.

Answering paragraph IV, admits the allegations thereof, except denies that American Plan is or was the manager of any of the business of American Fidelity except its United States automobile physical damage business.

V.

Answering paragraph V, admits the allegations thereof, except denies that Mark Hart is or ever has been president of American Fidelity.

VI.

Answering paragraph VI, admits the allegations thereof, except denies that L. Sudekum was or is a resident of New York.

VII.

Answering paragraph VII, admits the allegations thereof, except this defendant has no knowledge or information sufficient to form a belief as to the residence of the said John Will.

VIII.

Answering paragraph VIII, states that he has no knowledge or information sufficient to form a belief as to the truth of any of the averments contained in said paragraph.

IX.

Answering paragraph IX, alleges that on or about November 27, 1950, American Fidelity appointed Joseph Lotz its agent for the State of California with power to accept proposals for insurance covering such automobile risks as American Fidelity might authorize to be insured, and to charge the premiums for such proposals, and to collect premiums on insurance tendered by Lotz to and accepted by American Fidelity, and subject to approval by American Fidelity to adjust losses, and alleges that Lotz remained such agent with the powers hereinabove specified until on or about August 21, 1951; denies all the other allegations regarding Lotz's agency for American Fidelity.

As to the other allegations contained in Paragraph IX, this Third Party Defendant states that he has no knowledge or information sufficient to form a belief as to the truth thereof.

X.

Answering Paragraph X, this Third Party Defendant admits that he was and now is a resident of the State of California, and that he was an employee of the defendant, Joseph Lotz and of the American Plan, but not at the time stated in said

Third Party Complaint; denies he was ever at any time an employee of the American Fidelity.

XI.

Answering paragraph XI, admits the allegations thereof.

XII.

Answering paragraph XII, states that he has no knowledge or information sufficient to form a belief as to the truth of the averments thereof.

XIII.

Answering paragraph XIII, alleges that on or about November 27, 1950, American Fidelity appointed Joseph Lotz its agent for the State of California with the powers specified in paragraph IX of this Answer, and admits that Lotz as such agent thereafter procured insurance business for and on behalf of American Fidelity, and alleges that Lotz remained the agent of American Fidelity with the powers specified in paragraph IX of this Answer until on or about August 22, 1951, and except as herein alleged or admitted, denies each and every of the allegations of paragraph XIII.

XIV.

Answering paragraph XIV, this defendant alleges that he has no knowledge or information sufficient to form a belief as to the truth thereof.

XV.

Answering paragraph XV, denies each and every allegation thereof.

XVI.

Answering paragraph XVI, denies each and every allegation thereof.

XVII.

Answering paragraph XVII, states that he has no knowledge or information sufficient to form a belief as to the truth of the averments thereof.

XVIII.

With respect to the allegations of sub-paragraph (a), denies each and every allegation therein contained;

With respect to the allegations of sub-paragraph (b), admits the execution of the letter Exhibit 1 to the Third Party Complaint and the agreement Exhibit 2 thereof, and in that respect alleges that both said letter and agreement were executed on the same date, namely on or about August 22, 1951, and that the date August 17, 1951, on the letter Exhibit 1 was due to an error, and except as herein admitted and alleged, denies each and every of said allegations;

With respect to the allegations of sub-paragraph (c), states that he has no knowledge or information sufficient to form a belief as to the truth of the averments thereof;

With respect to the allegations of sub-paragraph (d), denies each and every allegation therein contained;

With respect to the allegations of sub-paragraph (e), alleges that on or about November 1, 1951, American Plan and plaintiff entered into an agree-

ment under the terms of which certain automobile insurance policies, carrying the aggregate unexpired premiums of approximately \$61,016.00, which policies had been written by American Fidelity through Joseph Lotz as its agent, were to be cancelled forthwith and said policies were to be rewritten at once by plaintiff; and except as herein alleged, denies each and every of said allegations; and

Further answering paragraph XVIII, denies that the plan or conspiracy therein referred to or any such plan or conspiracy ever existed or was carried out.

XIX.

Answering paragraph XIX, states that he has no knowledge or information sufficient to form a belief as to the truth of the averments thereof.

XX.

Answering paragraph XX, denies the existence of any such plan or conspiracy or any acts done pursuant to conspiracy, and except as thus denied, states that he has no knowledge or information sufficient to form a belief as to the truth of the averments of said paragraph.

XXI.

Answering paragraph XXI, admits the allegations thereof, except denies the existence of any such plan or conspiracy or any acts done pursuant to conspiracy.

XXII.

Answering paragraph XXII, states that he has no knowledge or information sufficient to form a belief as to the truth of the averments thereof.

XXIII.

Answering paragraph XXIII, denies each and every of the allegations thereof, and further denies the existence of any such plan or conspiracy or any acts done pursuant to conspiracy.

XXIV.

Answering paragraph XXIV, denies each and every of the allegations thereof, and especially denies that Third Party Plaintiff has been damaged in the sum of \$15,000.00, or in any amount at all.

Wherefore, this Third Party Defendant prays that the Third Party Plaintiff take nothing by the Third Party Complaint herein, and that this Third Party Defendant have judgment against Third Party Plaintiff for his costs of suit and for such other and further relief as to the Court may be meet and proper in the premises.

Dated: This 20th day of December, 1952.

/s/ BYRON L. DUSKY,

Attorney for Third Party Defendant
Ralph L. Smead.

Duly Verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 23, 1952.

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS AMERICAN
FIDELITY AND CASUALTY COMPANY,
INC., a corporation, and THE AMERICAN
PLAN CORPORATION, a corporation, to
COMPLAINT IN INTERVENTION

Come Now the Defendants American Fidelity and Casualty Company, Inc., a corporation (hereinafter called "American Fidelity"), and The American Plan Corporation, a corporation (hereinafter called "American Plan"), referred to hereinafter as "Defendants", and in answer to the Complaint in Intervention herein, admit, deny and allege as follows:

I.

Answering the allegations of paragraph I, Defendants state that they have no knowledge or information sufficient to form a belief as to the truth of any of the averments contained in said paragraph.

II.

Answering paragraph II, admit the allegations thereof.

III.

Answering paragraph III, admit the allegations thereof.

IV.

Answering paragraph IV, admits the allegations thereof, except deny that American Plan is or was the manager of any of the business of American Fidelity except its United States automobile physical damage business.

V.

Answering paragraph V, admit the allegations thereof, except deny that Mark Hart is or ever has been president of American Fidelity.

VI.

Answering paragraph VI, admit the allegations thereof, except deny that L. Sudekum was or is a resident of New York.

VII.

Answering Paragraph VII, admit the allegations thereof, except deny that H. Arthur Will (referred to as "John Will") was or is a resident of New York.

VIII.

Answering paragraph VIII, state they have no knowledge or information sufficient to form a belief as to the truth of any of the averments contained in said paragraph.

IX.

Answering paragraph IX, allege that on or about November 27, 1950, American Fidelity appointed Joseph Lotz its agent for the State of California with power to accept proposals for insurance covering such automobile risks as American Fidelity might authorize to be insured, and to charge the premiums for such proposals, and to collect premiums on insurance tendered by Lotz to and accepted by American Fidelity, and subject to approval by American Fidelity to adjust losses, and allege that Lotz remained such agent with the powers hereinabove specified until on or about August 21, 1951.

deny all the other allegations regarding Lotz's agency for American Fidelity.

As to the other allegations contained in paragraph IX, Defendants state that they have no knowledge or information sufficient to form a belief as to the truth thereof.

X.

Answering paragraph X, state that they have no knowledge or information sufficient to form a belief as to the truth of the averments that Ralph L. Smead was and is a resident of the State of California and an employee of Joseph Lotz, or of any of said averments; admit that Smead now is, and since January 22, 1952, has been an employee of American Plan, and except as so admitted or denied, deny each and every of the allegations of paragraph X.

XI.

Answering paragraph XI, admit the allegations thereof.

XII.

Answering paragraph XII, state that they have no knowledge or information sufficient to form a belief as to the truth of the averments thereof.

XIII.

Answering paragraph XIII, allege that on or about November 27, 1950 American Fidelity appointed Joseph Lotz its agent for the State of California with the powers specified in paragraph IX of this Answer, and admit that Lotz as such agent thereafter procured insurance business for and on

behalf of American Fidelity, and allege that Lotz remained the agent of American Fidelity with the powers specified in paragraph IX of this Answer until on or about August 22, 1951, and except as herein alleged or admitted deny each and every of the allegations of Paragraph XIII.

XIV.

Answering paragraph XIV, allege that on or about August 1, 1951 Joseph Lotz was indebted to American Fidelity in the sum of approximately \$205,111.95 rather than \$190,984.00. Defendants state that they have no knowledge or information sufficient to form a belief as to the truth of the allegation that Lotz was insolvent on or about August 1, 1951, or at any other date. Except as so alleged and denied, deny each and every of the allegations of paragraph XIV, and further specifically deny that Defendants have known at all times or at any time that Lotz was insolvent.

XV.

Answering paragraph XV, deny each and every allegation thereof.

XVI.

Answering paragraph XVI, deny each and every allegation thereof.

XVII.

Answering paragraph XVII, state that they have no knowledge or information sufficient to form a belief as to the truth of the averments thereof.

XVIII.

Answering the allegations of paragraph XVIII:

With respect to the allegations of sub-paragraph (a), deny each and every allegation therein contained;

With respect to the allegations of sub-paragraph (b), admit the execution of the letter Exhibit 1 to the Complaint in Intervention and the agreement Exhibit 2 thereto, and in that respect allege that both said letter and agreement were executed on the same date, namely on or about August 22, 1951, and that the date August 17, 1951 on the letter Exhibit 1 was due to an error, and except as herein admitted and alleged deny each and every of said allegations;

With respect to the allegations of sub-paragraph (c), state that they have no knowledge or information sufficient to form a belief as to the truth of the averments thereof;

With respect to the allegations of sub-paragraph (d), deny each and every allegation therein contained;

With respect to the allegations of sub-paragraph (e), allege that on or about November 1, 1951, American Plan and plaintiff entered into an agreement under the terms of which certain automobile insurance policies, carrying the aggregate unexpired premiums of approximately \$61,016.00, which policies had been written by American Fidelity through Joseph Lotz as its agent, were to be cancelled forthwith and said policies were to be rewritten at once by plaintiff; and except as herein al-

leged, deny each and every of said allegations; and

Further answering paragraph XVIII, deny that the plan or conspiracy therein referred to or any such plan or conspiracy ever existed or was carried out.

XIX.

Answering paragraph XIX, state that they have no knowledge or information sufficient to form a belief as to the truth of the averments thereof.

XX.

Answering paragraph XX, deny the existence of any such plan or conspiracy or any acts done pursuant to conspiracy, and except as thus denied state that they have no knowledge or information sufficient to form a belief as to the truth of the averments of said paragraph.

XXI.

Answering paragraph XXI, admit the allegations thereof, except deny the existence of any such plan or conspiracy or any acts done pursuant to conspiracy.

XXII.

Answering paragraph XXII, state that they have no knowledge or information sufficient to form a belief as to the truth of the averments thereof.

XXIII.

Answering paragraph XXIII, deny each and every of the allegations thereof, and further deny the existence of any such plan or conspiracy or any acts done pursuant to conspiracy.

XXIV.

Answering paragraph XXIV, deny each and every of the allegations thereof, and especially deny that Plaintiff in Intervention has been damaged in the sum of \$15,000.00 or in any sum at all.

As and for a Separate and Further Defense Defendants allege:

XXV.

Defendants and Plaintiff in Intervention have not been and are not in privity and no duty has been or is owed by Defendants to Plaintiff in Intervention. The claim of Plaintiff in Intervention against Defendants is conditioned on a recovery by Plaintiff Mid-States Insurance Company against Plaintiff in Intervention in another action as alleged in the Complaint in Intervention, and Plaintiff in Intervention proceeds in its Complaint in Intervention against Defendants as subrogee of Plaintiff Mid-State Insurance Company. The claim of Plaintiff in Intervention, as subrogee, against Defendants is subject to all defenses, set-offs, and counter-claims which Defendants have against Plaintiff Mid-States Insurance Company. In Defendants' Answer and Counter-claims to the Complaint of Plaintiff Mid-States Insurance Company herein, Defendants set up various defenses and counter-claims against the claim of Plaintiff Mid-States Insurance Company. Defendants hereby incorporate and make a part of this pleading all of the contents of said Answer and Counter-claims to the Complaint of Plaintiff Mid-States

Insurance Company and hereby set up all the defenses and counter-claims contained in said pleading in opposition to the claim of Plaintiff in Intervention herein as well as to the claim of Plaintiff Mid-States Insurance Company, with the same effect as if said Answer and Counter-claims and all the defenses and counter-claims contained in it were fully set forth herein.

As and for a Separate and Further Defense Defendants allege:

XXVI.

The Complaint in Intervention fails to state a claim against Defendants upon which relief can be granted.

Wherefore, Defendants pray that Plaintiff in Intervention take nothing by the Complaint in Intervention herein and that Defendants have judgment against Plaintiff in Intervention for their costs of suit and for such other and further relief as to the Court may seem proper in the premises.

Dated: This 30th day of December, 1952.

/s/ HAROLD R. McKINNON,

/s/ BRONSON, BRONSON &
McKINNON,

Attorneys for Defendants American Fidelity and Casualty Company, Inc., and The American Plan Corporation.

[Endorsed]: Filed December 31, 1952.

[Title of District Court and Cause 31311.]

AMENDMENT TO ANSWER OF THIRD
PARTY DEFENDANTS American Fidelity
and Casualty Company, Inc., a corporation,
and The American Plan Corporation, a cor-
poration, to Third Party Complaint

Come Now Third Party Defendants American Fidelity and Casualty Company, Inc., a corporation, and The American Plan Corporation, a corporation, and by written consent of Plaintiff and of Third Party Plaintiff herein, amend their Answer to the Third Party Complaint herein as follows:

By striking out of said Answer the Separate and Further Defense therein beginning with the words "As And For" in line 20, page 7 of said Answer and ending with the words "Insurance Company herein", in line 27, page 7 of said Answer.

Dated: March 18, 1953.

/s/ HAROLD R. McKINNON,

/s/ BRONSON, BRONSON &

McKINNON,

Attorneys for Third Party, Defendants, American Fidelity and Casualty Company, Inc., and The American Plan Corporation

CONSENT TO AMENDMENT TO ANSWER

We consent to the foregoing Amendment to Answer.

Dated: March 18, 1953.

/s/ MAYNARD GARRISON,

/s/ JOHN R. PASCOE,

/s/ JOSEPH MARTIN, JR.,

/s/ WALLACE, GARRISON, NORTON
& RAY,

Attorneys for Plaintiff

/s/ SEVERSON & McCALLUM,

/s/ ALMON McCALLUM,

Attorneys for Defendant and Third
Party Plaintiff

[Endorsed]: Filed March 25, 1953.

[Title of District Court and Cause 31311.]

AMENDMENT TO ANSWER

Comes Now, the Defendant The Anglo California National Bank of San Francisco, a national banking association, and amending its Answer to the Complaint of Plaintiff on file herein by adding thereto a Ninth Affirmative Defense and First Counter-Claim avers as follows, to-wit:

I.

Realleges all of the allegations, issues, defenses, matters and things alleged and set forth in its Answer to the Complaint of Plaintiff heretofore and

on the 5th day of May, 1952, filed in the above-entitled cause as though herein set forth in full.

Ninth Affirmative Defense

As a Further, Separate and Ninth Affirmative Defense to the Complaint of Plaintiff on File Herein, Defendant Avers as Follows, to-wit:

I.

That it is the custom and usage both locally in the State of California and generally throughout the United States for (1) agents authorized to collect, receive and receipt for money owing to their principals where the debtors of such principals are removed from such principals and are in close proximity to said agents and the payments being made are for business transacted by such principals through such agents; and (2) for general agents of insurance companies authorized to collect, receive and receipt for premiums for insurance generally and for automobile physical damage insurance in particular to endorse and deposit checks delivered to such agents as and for payment of premiums on insurance or otherwise and made payable to the order of such agent's principals in the manner and as the checks referred to in the Complaint of Plaintiff on file herein were endorsed by Joe Lotz as the general agent of Plaintiff; and at all of the times alleged and upon each of the occasions referred to in the Complaint of Plaintiff on file herein such custom and usage as aforesaid was known to Plaintiff and such custom and usage as aforesaid was so

widely known and practiced that Plaintiff should have known thereof.

First Counterclaim

As and for a Separate and Further Defense to the Complaint of Plaintiff on File Herein and as and for a First Counterclaim, Defendant Alleges as Follows, to-wit:

I.

That since the commencement of this action Plaintiff above-named has commenced a separate action entitled, "Mid-States Insurance Company, a corporation, Plaintiff, vs. American Fidelity and Casualty Company, Inc., a corporation; The American Plan Corporation, a corporation; Mark Hart; Joseph Lotz; Ralph L. Smead; L. Sudekum; John Will; First Doe; Second Doe; Third Doe; Fourth Doe; Fifth Doe; and Sixth Doe, Defendants" and numbered 31496 on the records and files of this Court and entitled "Complaint for Fraud". In such other action this Defendant is not named as a Defendant and Plaintiff alleges therein that the Defendants named therein conceived, prepared and carried out a plan to and did acquire and divert to their use funds which this Plaintiff claims were its funds and praying judgment for the recovery thereof in the amount of \$297,097.91.

II.

That the sum of \$99,021.10 for which Plaintiff prays judgment against the Defendant in this ac-

tion is a part of and included in the aforesaid sum of \$297,097.91 and a part of the funds which Plaintiff alleges were acquired by and diverted to the use of the Defendants named in the said action numbered 31496 on the records and files of this Court.

III.

That upon payment of any sum to Plaintiff herein by the Defendants named in the aforesaid action numbered 31496 in satisfaction of any judgment against the said Defendants, or any of them, named in said action numbered 31496, or of the claims and demands therein made by Plaintiff by way of settlement by the said Defendants, or any of them, named in said action numbered 31496, Plaintiff to the extent of such payment or payments will be compensated for the loss or damage complained of and will have received payment of the sums sought in the above-entitled action.

Wherefore, Defendant prays that Plaintiff take nothing by its Complaint on file herein and that Defendant have judgment against the Plaintiff for its costs of suit incurred herein and for such other and further relief as to the Court may seem meet and proper in the premises; including but not limited to a judgment of this Court against Plaintiff and in favor of Defendant decreeing that Defendant shall be and is entitled to have credit against or reimbursement for, as the case may be, any sums, if any be found due from this Defendant to Plaintiff to the extent of the amount Plaintiff shall

recover or receive from the Defendants, or any of them, named in the action numbered 31496 on the records and files of this Court.

SEVERSON, McCALLUM & DAVIS

/s/ By ALMON McCALLUM

WORTHINGTON, PARK &

WORTHINGTON

/s/ By W. F. WORTHINGTON

CONSENT TO AMENDMENT TO ANSWER

We consent to the foregoing Amendment to Answer.

Dated: April 8, 1953.

/s/ MAYNARD GARRISON

/s/ JOHN R. PASCOE

/s/ JOSEPH MARTIN, JR.

WALLACE, GARRISON, NORTON

& RAY,

Attorneys for Plaintiff.

Duly Verified.

[Endorsed]: Filed April 16, 1953.

[Title of District Court and Cause 31311.]

AMENDMENT TO COMPLAINT

Comes now plaintiff, Mid-States Insurance Company, a corporation, and amends its Complaint on file herein by deleting therefrom the words "authority to receive, but" in paragraph II of said Complaint on line 10 of page 2 thereof.

Dated: May 6, 1953.

/s/ MAYNARD GARRISON

/s/ JOHN R. PASCOE

/s/ JOSEPH MARTIN, JR.

/s/ WALLACE, GARRISON, NORTON
& RAY,

Attorneys for Plaintiff.

CONSENT TO AMENDMENT TO COMPLAINT

We consent to the filing of the foregoing Amendment to Complaint.

Dated: May . . . , 1953.

SEVERSON, McCALLUM & DAVIS

/s/ By ALMON McCALLUM,

Attorneys for Defendant.

[Endorsed]: Filed May 7, 1953.

[Title of District Court and Cause No. 31496.]

OPINION

Roche, Chief Judge:

This is an action brought by Mid-States Insurance Company, hereafter called Mid-States, against (1) American Fidelity and Casualty Company, hereafter called American Fidelity, (2) its manager, the American Plan Corporation, and (3) certain agents and officers of these aforementioned defendants.

Plaintiff's complaint charges that the defendants conspired to defraud Mid-States, and that this conspiracy was actually carried out in breach of Lotz's (agent for Mid-States) fiduciary obligations to the Company. The prayer of the complaint is for \$297,097.91 and for \$50,000.00 as exemplary and punitive damages.

Counterclaims were interposed by some of the defendants, but little or no evidentiary proof supporting the allegations contained therein was offered at the time of the trial of this case.

The Anglo California National Bank (hereafter called Anglo) has by permission of the court filed a complaint in intervention in this action, and appears as a third party plaintiff. During the period of the conspiracy alleged in the Mid-States' complaint, the defendant Lotz endorsed and deposited in his account certain checks which were delivered to him, but which were drawn to the order of Mid-States. Mid-States in a separate action sued Anglo

on the theory that Lotz was not authorized to endorse checks payable to Mid-States, and this suit was settled after trial by payment of \$37,500.00 from Anglo to Mid-States.

Anglo, seeking recovery of this amount from the defendants, alleges that the endorsement of checks by Lotz was an act in furtherance of the fraudulent conspiracy upon which the principal action is based. As an alternative theory, Anglo claims recovery by way of subrogation should Mid-States recover in the principal action. Either theory of recovery depends on the showing of a fraudulent conspiracy on the part of the defendants.

The facts of the case are as follows: Both Mid-States and American Fidelity are insurance companies writing automobile collision insurance. In May, 1947, Mid-States appointed Lotz its general agent for the State of California, and thereafter Lotz procured substantial amounts of insurance business for Mid-States.

In November, 1950, American Fidelity also appointed Lotz as its general agent for this state. As the terms of his agency contract with that company were more favorable to him than those of his contract with Mid-States, Lotz thereafter placed the bulk of his business with American Fidelity. By August, 1951, some nine months later plaintiff's complaint alleges that Lotz was indebted to American Fidelity in the sum of approximately \$190,984.00. As Lotz had sharply curtailed his writings in Mid-States his total indebtedness to that company at that time totaled approximately \$30,000.00.

In the middle of this same month, August, 1951, Lotz and his office manager, Smead went to New York at the request of Mark Hart, president of American Fidelity. Hart had become concerned over the financial condition of the Lotz agency; a concern which was natural since a substantial check given by Lotz had been returned by the bank unpaid, and there was a large outstanding account which was delinquent. The evidence is conflicting as to exactly what was said and done at this meeting held in Hart's New York offices.

Mid-States contends it was at this meeting that Lotz and Smead disclosed their insolvency, and that the suggestion was made that another insurer be found which would accept Lotz's new policy writing from which premium monies could be obtained to pay off American Fidelity's defaulted account.

There is no dispute, however, that defendant American Fidelity directed that Lotz make prompt collection of his receivables, that immediately after the meeting Lotz proceeded to Chicago and was successful in negotiating a new and more favorable agency contract with Mid-States upon his assurance of giving them an increased volume of business, and that Smead returned to Oakland to make collections from sub-agents.

About a week after the New York meeting, August 20, 1951, Hart and Feller (General Counsel of American Plan) flew to Oakland for further conferences with Lotz and Smead. On August 22, 1951 during this visit defendants executed a written contract which provided (1) that Lotz's agency for

Fidelity and Casualty was terminated, (2) that the time allowed for payment of Lotz's total indebtedness was shortened so that payment would be completed by September 15, 1951,¹ and (3) that Lotz's financial control of the business was taken from him, and Smead was to act as representative of American Plan with authority over the financial end of Lotz's agency.

As a result of various transactions between the months of August and November, 1951, Lotz's indebtedness to American Fidelity was completely liquidated and his indebtedness to Mid-States increased substantially.

On November 24, 1951, officers of Mid-States traveled to Oakland and had several conversations with Lotz dealing with his financial condition. Lotz told the officials of Mid-States that he was in the red, and that this condition was due to high operating costs and high commissions paid to sub-agents. On November 27, 1951, Lotz submitted a letter to these officials telling them how he intended to operate his agency from that date on, and setting forth the various plans he intended to put into operation in order to stay in business and pay his indebtedness. The evidence discloses that on November 27, 1951 Lotz also gave Mid-States both a power of attorney and an assignment of his business.

Mid-States alleges that it was not until Decem-

¹ Lotz had a 75 day credit period with American Fidelity.

ber 4, 1951 that they learned all of the facts from Lotz concerning the alleged conspiracy to defraud, and that thereafter it sought to reduce its loss. The indebtedness was reduced to the sum of \$281,746.96, and it is this sum which plaintiff wishes to recover.

Anglo and Mid-States allege that the fraudulent conspiracy contemplated at least four separate activities, (1) the diverting to American Fidelity of premium funds received by Lotz for the account of Mid-States, (2) the cancelling by Lotz of policies in American Fidelity and the re-writing of these policies in Mid-States at a time when American Fidelity knew that Lotz was insolvent, (3) the writing of vastly increased amounts of insurance in Mid-States by Lotz without regard to the quality of the risks involved, and (4) the concealing from Anglo Bank and Mid-States of Lotz's insolvency and his inability to pay he indebtedness as it fell due.

In order to better understand this case it is essential to indicate the course of dealing between the parties.

The insurance policies of both Mid-States and American Fidelity were being written under what is known generally as a "retrospective plan." Under this plan, Lotz as general agent appointed sub-agents who were entitled to an immediate commission upon the premiums collected by them. The sub-agents forwarded reporting copies thereof to the company concerned. Lotz then became indebted to the company for the entire amount of the premium although he had a so-called credit period

within which to pay it. Lotz was not entitled to receive at any time any commission for himself or for any sub-agent but received his commission after the policy had expired, his commission being dependent upon the losses occurring under the policy. At the expiration of Lotz's credit period he was required to remit the entire premium to the company, which would pay losses from it together with its so-called "retention" and would at the expiration of the policy return any balance to Lotz as his commission.²

The original agency agreement between Lotz and Mid-States (May 15, 1947) contained no references to trust. The new agreement entered into September, 1951 provided in part:

* * * All premiums received by the Agent shall be held by such Agent as trustee for the Company.

² As an example of this method of operation:

Assume that a sub-agent collected.....	\$100.00
Assuming 25% commission retained by sub-agent.....	25.00
<hr/>	
Forwarded to Lotz by sub-agent.....	\$ 75.00
Time within which Lotz had to pay company, assume 65-75 days. End of 65-75 day period full payment to company	\$100.00
Retention of company for handling business, assume....	15.00
<hr/>	
Balance to pay losses and Lotz's commission.....	\$ 85.00
Net commission to Lotz where no losses.....	\$ 85.00
Less sub-agent's commission	25.00
<hr/>	
	\$ 60.00

If there were any losses, Lotz's ultimate commission would be proportionately less.

* * * The keeping of an account with the agent on the company's books, as a creditor and debtor account, is declared a record memorandum of business transacted, and neither such keeping of account, nor alteration in compensation rate nor failure to enforce prompt remittance or compromise or settlement or declaration of balance of account, shall be held to waive the understanding that the premiums collected by the agent are trust funds. * * *

It is a general rule of insurance law that an insurance agent is ordinarily a trustee as to premiums collected, however the way in which Lotz dealt with Mid-States' premiums was habitually inconsistent with a trust.

The evidence discloses that Lotz's agency was a retrospective one, i.e., he could not take his commissions out of the premiums he collected, but he had to wait until the premium was earned by the passage of time, and meantime he had to pay his operating expenses, (and later commissions to sub-agents). This required capital, but Lotz himself did not have sufficient working capital to pay all of his operating expenses and sub-agents' commissions. However, he did have a period of credit before Mid-States was to be paid; therefore, he used the company's funds, and Mid-States was fully cognizant of this fact.

Richard Cass, executive of Mid-States when the original Lotz agreement was entered into was asked in his deposition "* * * did the company know he used the money for operating expenses and paying

any subagents?", and he answered: "There was knowledge of such facts, yes."

The evidence discloses that Lotz, back in 1947, before entering into business with Mid-States told Donnelly the official of Mid-States who engaged him that he had no capital, and in answer Donnelly told him "You have got this length of time to pay our bills * * * you are using the company's money. That is the way the deal is set up."

Now, let us consider Lotz's method of handling funds. He kept two accounts. Into the trustee account went premiums received from sub-agents, salvage, and subrogation and transfers from operating account. He drew on the trustee account to pay premiums, to make transfers to operating account, and to pay sub-agents' commissions where not previously deducted. He drew on operating account to pay his operating expenses and his own personal and living expenses. Commissions which he earned went into the operating account when he received them by check, and when they were received by way of credit against the amount he owed a company the credit was made to his trustee account. He put personal borrowings into the operating account and he made transfers back from operating to trustee account. Such dealings were gravely inconsistent with trust.

In fact, receipt of the premiums is not what gave rise to the obligation from Lotz to Mid-States. The company kept no record of Lotz's receipt of premiums, nor were they concerned with that. Rather, a certain number of days after the close

of the month in which business was written, Lotz owed the amount of premiums to the company, regardless of whether he had collected it or not.

As Mr. Hatfield, vice-president of Mid-States testified, Lotz was "an independent contractor" with respect to keeping his own books and his own bank account.

The question posed in determining whether a debtor-creditor relationship now exists is whether the conduct of the parties was so inconsistent with the trust clause in the written contract between them so as to warrant the conclusion that the parties intended to modify the written contract. *Garrison vs. Edward Brown & Sons* (1944) 25 C (2d) 473; 154 P 2d 377. Where as in this case, with the company's knowledge, an agent mingled premium moneys with his own funds and otherwise used them inconsistently with a trust, a debtor-creditor relationship is established rather than trustee beneficiary relationship notwithstanding an agreement to the contrary. *Garrison vs. Edward Brown & Sons*, *supra*; *Twin City Fire Ins. Co. vs. Green* (1949) 176 Fed. (2d) 532; *Horton vs. Eagle Indemnity Ins. Co. (N. H.)* 171 A. 322. A debt is not a trust and there is not a fiduciary relation between debtor and creditor as such. *Downey vs. Humphrey* (1951) 102 CA 2d 323 227 P 2d 484.

From the foregoing it follows that if the funds were not trust funds they belonged to Lotz and he could use them to pay his obligations provided that no fraud or breach of fiduciary obligation was involved.

The burden in this case is on plaintiff to prove that a conspiracy to defraud Mid-States was entered into between the defendants. Plaintiff in presenting arguments to the court stated that this case is primarily a question of fact case, and was not regarded as involving serious questions of law.

Plaintiff's brief is very exhaustive, and cites many cases which deal with fraudulent acts committed by agents and/or debtors participated in by third parties. All of these cases were helpful in formulating the general principles of law applicable to the questions presented to the court. One case which plaintiff particularly stresses is *Machado vs. Katcher* (1951) 108 CA 2d, 1; 237 P 2d 715.

Of great significance in the *Machado* case is the fact that there was testimony that the third party (Lewis) knew that Machado and other creditors could not be paid. Further, a motive for favoring Lewis is indicated by the intimacy between Lewis, Katcher, Sr., and the corporation. For the purpose of distinguishing the instant case, it is the court's view that the defendants were not aware that Lotz's creditors could not be paid. Nor was any motive shown for Lotz to engage in a fraudulent plan, i.e., close relationship to Fidelity and Casualty; dislike of Mid-States. Lotz's sole intention as adduced by the court from the evidence in this case was to pay his debts, and thereby continue in business.

Conflicting evidence was offered concerning the meeting held by the defendants in New York, the alleged birthplace of the fraudulent conspiracy.

Plaintiff charges it was at this meeting that Smead and Lotz first disclosed their insolvency, and that it was there that the suggestion was first made that another insurer be found which would accept Lotz's new business.

The court is of the view that the evidence presented at the trial of this case does not substantiate the allegation that the defendants entered a conspiracy to defraud plaintiff. Fidelity and Casualty asked Lotz for payment, and tried to determine how Lotz intended to pay his indebtedness. Lotz renewed relations with Mid-States and wrote an increased amount of business for this company. Business which Mid-States was anxious to get. The loss ratio on this new business compared favorably with the loss ratio on business Lotz had written for American Fidelity. In fact a great deal of Lotz's prior business with both of these companies had been sub-standard. Hart's testimony rebutted all evidence in the record which attempted to show fraudulent intent on the part of defendants.

It is well to note that Lotz was in the same type of difficulty with Fidelity and Casualty in August, 1951 as he was to find himself with Mid-States in December, 1951. Both companies, as a result of the "retrospective" agency arrangement found Lotz indebted to them in huge sums. In both instances Lotz reacted in the same manner. He directed all his efforts towards saving his agency.

Plaintiff contends that Lotz was hopelessly insolvent in August, 1951, and with that knowledge, as plunging himself into deeper insolvency, pre-

ferring American Fidelity, and dooming Mid-States to a large loss.

This knowledge of Lotz's finances can be arrived at only after assembling and studying the figures since the period within which the alleged fraud took place. Actually, no exact knowledge of the financial status of the agency was known when the defendants carried on the various transactions complained about.

From the testimony of the witnesses the court believes that Lotz always had the intention of remaining in business. Nowhere has it been alleged or proven that Lotz reaped any benefits as a result of the alleged fraudulent conspiracy. It is an incompetent conspirator, indeed, who at the completion of his "fraud" ends up in a worse financial condition than when he started. It is hard to imagine a debtor who for absolutely no gain would allow himself to be subjected to approximately three months of constant pressure and haranguing from a creditor anxious for payment. This is not the conduct of a fraudulent conspirator, but rather of a man attempting, and intending to stay in business.

As a witness Lotz gave the impression of being a very confused and mentally upset person. Lotz was formerly a baseball pitcher, and only as recently as 1947 went into the insurance business on a large scale. It was not with his own capital that he accomplished this, but only by using funds which actually belonged to his creditors, and which he had

in his possession during the "credit period."³ This method of operation was carried on with the knowledge of both Mid-States and Fidelity and Casualty, and is highly significant in determining Lotz's state of mind. The evidence discloses that up until the time that Mid-States took over his agency, Lotz was planning to tighten his management, and reduce operating costs thereby enabling him to meet his bills and eventually put the agency on a more solid footing. This is evident in the fact that as late as November 27, 1951, Lotz developed a plan involving reduction of expenses and other factors designed to render his business more profitable. Moreover, the evidence discloses that Mid-States itself as late as November or early December thought that the situation could be worked out and said that Mid-States would try to help Lotz.

Lotz's testimony threw a great deal of light on his mental processes. Reading Smead's written statements and supplements, Lotz said, "I was very influenced by Ralph's (Smead's) point of view because of my mental condition at that time. I wasn't too much on a good equilibrium basis with this worry and other things, physical condition." It might well be that Lotz was an imprudent, ill-advised business man who did not know very much about the internal operation and problems of his insurance agency, but it cannot be developed from

³ Both companies, competing with each other for a volume of business in this State, offered attractive inducements to Lotz in order to secure his account, i.e., longer credit periods, less retention.

the evidence presented that Lotz had intended to conduct himself fraudulently in trying to save his business.

Plaintiff's brief speaks in generalities of Lotz's duty as an agent of Mid-States to reveal his financial standing and his dealings with other companies. However, the evidence discloses that plaintiff's own conduct was responsible to a great extent for the creation and continuation of those activities which caused plaintiff's losses. Lotz was never held to account as to his financial ability before the time the loss was suffered, and Mid-States did not concern itself with how Lotz kept his books as long as his payments were on time. Lotz was an independent contractor as to the operation of his business. No duty can be spelled out on the part of Lotz to account to Mid-States as long as he and the other defendants did not conspire to defraud Mid-States.

Mid-States had realized in the past that Lotz was not too reliable or experienced a business man. The evidence discloses that in August, 1950, Mr. Titus, president of Mid-States, issued a memo that "Lotz needs to be watched very closely on a day to day basis." In June, 1951, Titus again observed "If we can't get any better representation in California than Joe Lotz, we will never stay out of trouble."

In fact the evidence further discloses that in his dealings with Mid-States Lotz always had been delinquent in his remittances, often from 30 to 60 days, and the record shows letters and telegrams

from Mid-States repeatedly demanding payments that were overdue.

Plaintiff relies to a great extent on statements prepared and signed by Lotz and his office manager Smead. The evidence discloses that before the trial of this case Smead testified under oath on numerous proceedings arising out of the subject matter of this case. Various material inconsistencies were evident in his testimony, and during trial of this case the court interrogated the witness as follows:

The Court: "If I understand you, then, you admit yourself you lied?"

The Witness: "Yes, sir * * *"

In view of this admission of untruthfulness, and the poor impression Smead made as a witness it is possible for the court to give very little credence to his testimony.

Ralph Smead was appointed on August 22, 1951 to act as agent of Fidelity and Casualty in supervising the payment of Lotz's indebtedness to that Company. Fidelity and Casualty wished to have someone in Lotz's agency who could be relied upon. Lotz himself was a sick and disturbed man, and the evidence discloses that he relied very heavily on Smead's abilities. In the absence of a showing of fraudulent intent on the part of the defendants, the act of appointing Smead does not appear overly significant to the decision in this case.

Plaintiff Mid-States cites Lotz's rewrite of a large block of insurance, termed the public service transaction, as an example of the devices used by defendants to effectuate their conspiracy to defraud

Mid-States. The evidence discloses that Mid-States was aware of the transaction except for a few days delay in reporting which was due to secretarial work in typing a large number of reports, and that Mid-States and Lotz carried on correspondence discussing this transaction, Lotz being able to clear up the objections which Mr. Hatfield had to some of the risks involved.

Complaint is also made of a transaction involving another insurance rewrite, a block of insurance policies from American Fidelity to Mid-States, the amount involved being about \$61,000.00. It is alleged by plaintiff that it was induced to enter this transaction by certain alleged misrepresentations made by Hart, President of American Fidelity, to Hatfield, Vice-President of Mid-States.

The evidence discloses that this conversation took place on October 31, 1951. In order to understand the import of Hart's words one must take into consideration that Mid-States was anxious to get all of Lotz's business, and that on September 8, 1951, Lotz had told Mid-States that his agency was no longer sending American Fidelity any business whatsoever.

Taking into consideration the fact that Hart and Hatfield were both experienced business executives in large competing insurance companies it is the court's view that Hatfield did not rely on Hart's representations. Additionally, the court carefully read the conversation between Hart and Hatfield, and gives little weight to the argument that Hart's words were fraudulently intended. The conversa-

tion had must be read with the entire record of the case in mind in order to give the words contained therein their proper perspective and significance.

From a study of the entire record in this case the court concludes that plaintiff has not sustained the burden of proving a conspiracy to defraud between the defendants. The underlying factor which motivated both insurance companies in this case was to secure all the business possible in this State, and it was this anxiety for business which caused a great loss to one of them.

The fundamental basis of plaintiff's case is the written statement of Smead, and Smead's word is impugned by his own admission of untruthfulness. The course of dealing between the parties discloses a method of handling the Lotz agency which was contrary to a trust relationship, and in the absence of a showing of a fraudulent conspiracy on the part of the defendants, plaintiff cannot prevail. Lotz in paying Fidelity and Casualty preferred the creditor who was vigilant and actively pursued collection of its debt.

Anglo Bank, in accord with the above reasoning, has no right of recovery against the defendants as it was stated in the bank's brief that should Mid-States fail to prove a fraudulent conspiracy it too, would be precluded from recovery.

In accordance with the foregoing

It Is Ordered that judgment be entered herein upon findings of fact and conclusions of law as follows: That plaintiff Mid-States Insurance Com-

pany take nothing by its complaint against the defendants, that Anglo Bank, plaintiff in intervention take nothing by way of its complaint against the defendants, and that defendants Peter Lotz, American Fidelity and American Plan take nothing by way of their counter-claims. The respective parties to pay their own costs.

Dated: October 11th, 1954.

/s/ MICHAEL J. ROCHE,
Chief Judge, U. S. District Court.

[Endorsed]: Filed October 11, 1954.

[Title of District Court and Causes 31311-31496.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause numbered 31496 and the issues raised by the Third Party Complaint in cause numbered 31311 came on regularly for trial on a consolidated basis, and the Court having duly considered the evidence and being fully advised in the premises now makes the following findings of fact:

Findings of Fact

I.

Plaintiff Mid-States (below called Mid-States) is, and at all times referred to herein was, an insurance corporation organized under the laws of the State of Illinois.

Plaintiff in intervention The Anglo California

National Bank of San Francisco (below called Anglo Bank) is, and at all times referred to herein was, a national banking association organized and existing under the laws of the United States of America and authorized to transact, and transacting, a large banking business in the State of California, with its principal place of business in the City and County of San Francisco, State of California.

Defendant American Fidelity and Casualty Company, Inc. (below called American Fidelity) is, and at all times referred to herein was, an insurance corporation organized under the laws of the State of Virginia and doing business in the State of California.

Defendant The American Plan Corporation (below called American Plan) is, and at all times referred to herein was, a corporation organized under the laws of the State of New York and the manager of the United States automobile physical damage insurance business of American Fidelity.

Defendant Mark Hart is, and at all times referred to herein was, president of American Plan, but not of American Fidelity, and a resident of the State of New York.

At all times referred to herein defendant L. Sudekum was executive vice-president of American Plan, but not a resident of the State of New York.

At all times referred to herein defendant H. Arthur Will (sued herein as John Will) was treasurer of American Plan, but not a resident of the State of New York.

Defendant Joseph Lotz is, and at all times referred to herein was, a resident of the State of California, and a licensed insurance agent in said State.

Defendant Ralph L. Smead was an employee of defendant Lotz from October, 1950 to November, 1951, and was an employee of American Plan from January, 1952 to October, 1953, and is, and at all times referred to herein was, a resident of the State of California. Defendant Smead was never an employee of American Fidelity.

No one sued herein as a Doe defendant was served with complaint or summons and for that reason no finding is made with respect to such fictitiously named defendants.

The matter in controversy exceeds, exclusive of the interest and costs, the sum of \$3,000.00.

II.

On or about May 15, 1947 Mid-States appointed Lotz its general agent for the State of California, and Lotz thereafter procured insurance business for and on behalf of Mid-States. Lotz remained such general agent for Mid-States until January 21, 1952.

On or about November 27, 1950 American Fidelity appointed Lotz its general agent for the State of California and Lotz thereafter procured insurance business for and on behalf of American Fidelity. Lotz remained such general agent for American Fidelity until August 22, 1951, when said agency was terminated by mutual agreement.

Both said agencies were of a class in which the

agent receives his commission under what is called the "retrospective" plan. Under that plan the agent must pay to the insurance company the full amount of the premium on insurance written for the company without deducting his commission, and the commission is later paid to the agent on the basis of the loss experience after the loss is determined. Under such plan the agent has a certain period of time after the close of the month in which he has written insurance to pay to the insurance company the amount of the premiums on insurance written by him for that company during that month, such period being known as the "credit period". The full amount of the premium must be paid to the company regardless of when, or whether, the agent collects such premium, the determining factor for the creation of the obligation from the agent to the company being the writing of the insurance. In the case of Lotz's agency agreement with Mid-States, said retrospective plan was modified as of September 1, 1951 by provision for an advance commission of 15% as below stated.

Under Lotz's original agency agreement with Mid-States, his credit period was 25 days. On May 1, 1951, the credit period was changed to 75 days, and Mid-States also reduced the portion of the premium retained by it from 15% to 14%. By a new agency agreement effective September 1, 1951, the credit period was reduced to 60 days, but Lotz was given the right to retain out of premiums collected an advance commission of 15%.

Under Lotz's agency agreement with American

Fidelity, his credit period was 75 days, and he was guaranteed a commission of 20% of the premiums but he was not entitled to any advance commission.

Lotz was agent for several other insurance companies besides Mid-States and American Fidelity.

III.

On or about August 1, 1951, Lotz was indebted to Mid-States for approximately \$30,000.00 and to American Fidelity for approximately \$190,000.00.

On August 22, 1951, when the agency agreement between Lotz and American Fidelity was terminated, it was estimated by Lotz and American Plan that the remaining indebtedness of Lotz to American Plan was approximately \$247,000.00. Between that date and about October 31, 1951 Lotz paid American Fidelity all but approximately \$61,000.00 of that indebtedness. About November 1, 1951 American Fidelity and Mid-States entered into an agreement under which American Fidelity cancelled insurance which had been written for it by Lotz having a premium value of approximately \$61,000.00 and Mid-States rewrote such insurance and agreed to look to Lotz for payment of said premiums. By said transaction, Lotz was credited by American Fidelity with the amount of said premiums which approximated \$61,000.00 and thus Lotz's indebtedness to American Fidelity was completely liquidated and Lotz's indebtedness to Mid-States was increased by that amount.

IV.

During the period from November, 1950 to Au-

gust, 1951, in which Lotz acted as agent for both Mid-States and American Fidelity, Lotz had decreased his underwritings for Mid-States and had written large amounts of insurance for American Fidelity. During said period Mid-States tried to reverse this tendency by urging Lotz to write more insurance for it and by giving him more favorable terms as above stated. About August 13, 1951 Lotz requested American Plan to give him a 15% advance commission but American Plan declined to do so because under its contract with American Fidelity it was not permitted to do so. About August 14, 1951, Lotz procured from Mid-States the above mentioned agreement, effective September 1, 1951, to pay him such an advance commission. Lotz wrote no more business for American Fidelity after August 22, 1951. After procuring said new agreement from Mid-States he greatly increased his underwritings for Mid-States. Such underwritings were reported by Lotz to Mid-States approximately daily, with the exception of certain rewritings of multiple policies of another company where Lotz's reporting to Mid-States was delayed several days owing to the stenographic task involved. By virtue of such reportings Mid-States was kept currently advised of such increased amounts of underwritings on its behalf.

V.

Shortly prior to November 27, 1951, Hatfield, vice-president and general manager of Mid-States, conferred with Lotz. Lotz then advised Hatfield that he was in financial difficulty, but stated that by con-

tinuing to operate his agency and by instituting certain economies and other improvements in his business practices he would be able to pay to Mid-States all that he owed it. On November 27, 1951 he gave Mid-States a letter to that effect. In said letter he outlined the steps he proposed to take, which steps included the hiring of George Kledzik, a representative of Mid-States, as Lotz's general manager with full power and authority to run the agency. Both Lotz and Hatfield then thought the plan would succeed, and Hatfield undertook to cooperate with Lotz in carrying it out. Thereafter, during the month of December, 1951 the plan was cancelled by Mid-States. As of January 1, 1952 Mid-States took the occupancy of Lotz's office, and all expenses from then on were paid by Mid-States, and Mid-States proceeded to liquidate the agency and on completion of the liquidation its loss on the agency amounted to \$281,746.96, which it seeks to recover in this action.

VI.

Under his agency agreement with Mid-States, Lotz was obliged to pay all the expenses of the agency, and since he was on a retrospective commission basis he had to wait for his commissions until loss experience on the insurance written by him had been determined (except that effective September 1, 1951 he became entitled to a 15% advance commission as elsewhere stated in these findings). Therefore he needed working capital, but he did not have any. At the time he entered into his agency agreement with Mid-States in 1947, he advised

Mid-States that he had no capital and Mid-States advised him that he could use the premiums for his expenses and that the transaction between Mid-States and Lotz was based on that arrangement.

At the outset Lotz's expenses were very small, but later his business grew until he had about 40 employees, and as his business expanded his expenses increased.

At the beginning of Lotz's agency for Mid-States Lotz did not pay any commissions to others on business which he wrote, but later and during the period involved in this litigation Lotz paid, in addition to other expenses, commissions to sub-agents from whom he got business, which commissions were deducted by such sub-agents from the premiums when they transmitted the premiums to Lotz, except in a few instances when the sub-agents paid the full premium to Lotz and Lotz then paid the commissions to the sub-agents.

From January to August, 1951, during which Lotz acted as agent for both Mid-States and American Fidelity, his operating expenses and personal drawings amounted to 15.4% of the premiums on business written by him for all companies he represented, and the percentages of commissions paid by him to sub-agents from January 1 to November 30, 1951 were as follows: On Mid-States' business, 26%; on American Fidelity's business, 23%; and on all companies which he represented, 26.7%.

In accordance with Lotz's arrangement and understanding with Mid-States as above stated, Lotz used premiums on business written for Mid-States

and other companies he represented to pay said operating expenses and personal drawings and sub-agents' commissions, and Mid-States knew that the premium moneys on its business were used by Lotz for such purposes and permitted him to engage in such practices.

In addition, Lotz commingled such premiums with other funds as below stated. He kept two bank accounts, one of which he called trustee account and the other operating account. He deposited in the trustee account premiums received by him (usually after deduction of sub-agents' commissions), salvage, subrogation and transfers from the operating account. He drew on the trustee account to pay premiums to companies he represented, to make transfers to operating account, and to pay sub-agents' commissions where not previously deducted. He drew on the operating account to pay his operating expenses and personal drawings. When he received commissions by check they were put in the operating account; when he received commissions in the form of credit against the amount he owed a company they were credited to his trustee account. He put personal borrowings into the operating account, and to replenish trustee account he made transfers from operating to trustee account.

Mid-States considered Lotz as an "independent contractor" with regard to the keeping of his books and bank account and in full charge of those matters.

Almost every month during his agency for Mid-States Lotz was overdue in making payments due

to Mid-States, and Mid-States habitually sent him demands by letter and telegrams for payment of such overdue sums, often two or three times for a single month's payment.

By virtue of the foregoing facts and other facts in relation to this agency, the court finds that premiums collected by Lotz on Mid-States' business were not trust funds in his hands for Mid-States but funds which belonged to Lotz, and that the agency agreements between Lotz and Mid-States, covering the whole period of such agency, were and each of them was modified insofar as any of the terms of such agreements were inconsistent with said fact; and it is not true as alleged in the complaint that said premiums were received and held by Lotz in a fiduciary capacity.

Said new agency agreement of September 1, 1951 between Lotz and Mid-States contained the following provisions, "All premiums received by the Agent shall be held by such Agent as trustee for the Company. The privilege of taking commissions provided in Paragraph '9' of this agreement from premiums received by such Agent shall not be construed as changing the relationship of the respective parties hereto or of the fact that the premiums received are trust funds. The keeping of an account with the Agent on the Company's books, as a creditor and debtor account, is declared a record memorandum of business transacted, and neither such keeping of account, nor alteration in compensation rate, nor failure to enforce prompt remittance or compromise or settlement or declaration of balance of account,

shall be held to waive the understanding that the premiums collected by the Agent are trust funds or change the character of such premiums”.

But the course of dealing between Mid-States and Lotz was not altered after the execution of said agreement of September 1, 1951, and on and after September 1, 1951 Mid-States continued to permit Lotz to handle premiums on its business and to handle his said bank accounts and his books and his other transactions in relation to Mid-States' business as he had done prior thereto, and the court finds that the premiums collected by Lotz after September 1, 1951 on Mid-States' business were of the same character as those collected by him prior to said date, namely that they were not trust funds but funds which belonged to Lotz.

VII.

Lotz had been a professional baseball player and only in 1947 began to conduct a business of the scale here involved. Mid-States knew that Lotz was inexperienced and unreliable in such a business, and in August, 1950 and June, 1951 the president of Mid-States, by inter-office memos, expressed the necessity for a close watch on his affairs and the fear that if Mid-States could not get better representation by Lotz it would never stay out of trouble. Nevertheless, during the period from October, 1950 to the end of 1951, Mid-States did not make or initiate any examination of Lotz's books or ask for an audit of the same, and it showed little concern

over his business methods and practices other than some aspects of his underwriting.

The loss ratio on the business written by Lotz for Mid-States from January 1, 1951 to August 31, 1951 was 64.65%, and from September 1, 1951 to December 31, 1953 it was 68.51%. The loss ratio on the business written by Lotz for American Fidelity from the beginning of his writing for them until the last transaction on said business had been run off was 79.51%. Loss ratio on Mid-States' business was computed monthly by Mid-States and was currently known by them.

In spite of the facts that Lotz's combined expenses and sub-agents' commissions on Mid-States' business amounted to over 40% and the portion of the premium retained by Mid-States was 14% and the loss ratio on said business was as above set forth, Mid-States urged Lotz to write more business for it, and Lotz's writings for Mid-States increased greatly after August 14, 1951.

By reason of the facts set forth in these findings and of other facts, the court finds that Mid-States' own conduct was to a great extent responsible for the loss for which it sues hereunder and for the creation and continuation of those activities of the Lotz agency which caused Mid-States' loss, and Lotz was not guilty of concealment of any facts which he was under any duty to disclose and Mid-States did not rely on any non-disclosure of facts by Lotz.

VIII.

At all times mentioned in the complaint and in

the complaint in intervention, Lotz's books of account were in a chaotic state and incomplete, inaccurate and inadequate for the purpose of showing the true financial condition of his agency. Among other defects in the bookkeeping, the posting of the books were several months behind. It took a group of accountants employed by Mid-States about two months to post the books and make an audit. Said group consisted of three accountants and a supervisor. Their work began in December, 1951. Lotz was also negotiating for a bank loan. And in the latter part of November, 1951 Lotz and Hatfield thought that with economies and improved business practices Lotz would be able to pay his obligations.

By the above mentioned examination and auditing of Lotz's books, it was disclosed that based on Lotz's books he had a deficiency of assets on and after August 1, 1951, but in view of the facts above stated and of other facts it is not true that defendants knew on or about August 1, 1951 or at any time prior to approximately December, 1951 that Lotz was insolvent or that he would be unable to meet his obligations to Mid-States.

Neither American Fidelity nor American Plan ever made any examination of Lotz's books nor during the period involved in this litigation did either of them know that Lotz was insolvent.

IX.

No plan or conspiracy to deceive or defraud Mid-States or Anglo Bank was entered into or carried out by defendants.

The statements made by Hart, president of American Plan, to Hatfield, vice-president and general manager of Mid-States, in the telephone conversation between those parties of about November 1, 1951 regarding the cancellation by American Fidelity of approximately \$61,000.00 premium value of insurance and the rewriting of that insurance by Mid-States were not made with any intent to deceive or defraud, and those statements were not relied upon by Hatfield or by Mid-States in entering into the contract with American Fidelity for such cancellation and rewriting of insurance, and no fraud or deceit was practiced by or on behalf of American Fidelity or American Plan with respect to that contract, and that contract and transaction were not a part of any plan or conspiracy by defendants to deceive or defraud Mid-States or Anglo Bank.

X.

Owing to the condition of Lotz's books he could not tell from his books at any time with any degree of accuracy how much he owed Mid-States or American Fidelity or any other company he represented, and Lotz's habit was to pay the company that happened to be pressing him at the time.

XI.

During the time that Lotz acted as agent for both Mid-States and American Fidelity, the business written by him for both companies was largely sub-standard business, but both companies cur-

rently knew this by virtue of daily reports and loss experience.

The loss ratio on the business written by Lotz for Mid-States was lower than that on the business written by him for American Fidelity.

XII.

No plan was conceived or prepared by defendants to induce or cause Lotz to pay to American Plan or American Fidelity funds received by him as premiums on insurance written or procured by him for Mid-States or to apply said funds to the repayment of the indebtedness of Lotz to American Fidelity. The said premiums were not received or held by Lotz as trust funds or as fiduciary for Mid-States, and it is not true that they were known by defendants to be trust funds or held by Lotz as fiduciary.

As herein stated, certain insurance written by Lotz for American Fidelity was cancelled and such insurance rewritten by Lotz for Mid-States, but this was not done pursuant to any plan or conspiracy by defendants to deceive or defraud, and said cancellation and rewriting of insurance was done pursuant to agreement legally made between Mid-States and American Fidelity. Defendants did not know at the time said agreement was entered into that Lotz would be unable to pay Mid-States the premiums on such insurance to be so rewritten, and said defendants did not plan to take any action necessary to conceal from Mid-States or Anglo Ban'

any insolvency of Lotz or inability by him to pay said premiums.

XIII.

A meeting took place on August 13, 1951, in New York in the office of defendant Mark Hart at which there were present defendants Mark Hart, Joseph Lotz, Ralph L. Smead, L. Sudekum, H. Arthur Will, and Samuel R. Feller, attorney for American Plan, but said meeting was not conceived or prepared pursuant to any plan to deceive or defraud, nor was any plan to deceive or defraud communicated to or discussed with defendants Lotz or Smead at said meeting or otherwise. No agreement was made between defendants that Lotz would pay to American Fidelity or American Plan premiums received by him on insurance written for Mid-States, and the defendants did not enter into any agreement for the purpose of defrauding or deceiving Mid-States or Anglo Bank or enriching American Fidelity or American Plan, nor did they have any such purpose.

Defendants did not conspire or agree among themselves to take any action to conceal Lotz's insolvency from Mid-States or Anglo Bank, nor did they conspire or agree among themselves that Lotz would write excessively large amounts of insurance for Mid-States or would write such insurance regardless of the nature of the risks involved or at high or excessively high advance premiums to sub-agents.

XIV.

The defendants never entered into or carried out

the plan or conspiracy referred to in the complaint or in the complaint in intervention, or any such plan or conspiracy.

Defendant Lotz was not guilty of any concealment of insolvency on his part and did not agree to divert to American Fidelity or American Plan any funds held or to be received by him for Mid-States as premiums on insurance written by him for Mid-States. Lotz did not conspire or agree with any other defendants as alleged in the complaint or in the complaint in intervention. The rewriting of insurance previously written by him for American Fidelity was not done for the purpose of enabling American Fidelity to reduce the amount of otherwise uncollectible indebtedness due it from Lotz at the expense of Mid-States. New insurance written by Lotz for Mid-States was large in amount, and some of it was of sub-standard risk, and Lotz paid advance premiums on it to sub-agents, but Mid-States currently received reports of such insurance and Mid-States knew that Lotz was paying the advance commissions to sub-agents thereon, and Lotz was not guilty of any concealment in regard to said matters. The proceeds of the checks described in paragraph XVIII of these findings were deposited by Lotz in his bank account referred to by him as trustee account, and Lotz thereafter made payments out of said account to American Fidelity which payments included in part funds derived from the proceeds of some of the checks above mentioned. Among said checks were checks drawn by Public Service Insurance Co. on Pacific National Bank of

San Francisco totalling \$94,136.69, which latter checks represented the unearned premiums paid by Public Service Insurance Co. for the rewriting by Mid-States of a large block of policies which had previously been written by Public Service Insurance Co. and which by agreement made with Lotz acting on behalf of Mid-States were cancelled by Public Service Insurance Co. and rewritten by Mid-States. Lotz did not surrender to American Fidelity or American Plan full control and authority over his agency and finances, but the only authority given to American Fidelity or American Plan was that referred to in the Memorandum of Agreement dated August 22, 1951, Exhibit 2 to the complaint herein.

For the reasons herein stated, Lotz was not guilty of any concealment, fraudulent or otherwise, from Mid-States or Anglo Bank in such matters, either at the direction or instigation of the other defendants or by agreement with them or at all.

American Plan refused Lotz's request for an advance commission as herein stated and Lotz promptly thereafter advised Mid-States that he had tried to get a better deal from American Plan and had failed, but no concealment, misrepresentation or deceit was practiced by Lotz or any other defendant upon Mid-States or Anglo Bank in that connection.

On or about August 22, 1951, and not August 17, 1951, American Fidelity, American Plan, Lotz and Smead entered into a written agreement, which

written agreement is attached to the complaint and to the complaint in intervention herein as Exhibit 2. Said agreement contains the following provision:

“The Manager hereby appoints Ralph L. Smead as its representative and Lotz agrees that the said representative shall have full authority over the finances of the agency and in connection with the matters referred to herein subject to instructions of the Manager.”

Said agreement did not give Smead as representative of American Fidelity and American Plan full and complete control and authority over the financial affairs of defendant Lotz and his insurance agency but over the finances of said agency insofar as such finances related to the payment to American Fidelity of the obligation of Lotz to said company as described in said agreement and to the other duties and rights of Lotz in respect of his agency for American Fidelity as therein stated. Said agreement was not entered into nor was such authority given for the purpose of diverting to American Fidelity or American Plan any funds held or received by Lotz representing premiums on insurance written by Lotz for Mid-States.

The letter from Mark M. Hart to Ralph L. Smead dated August 17, 1951, and the agreement above mentioned dated August 22, 1951, which are attached as Exhibits 1 and 2 respectively to the complaint and the complaint in intervention herein are true and correct copies of the documents which they purport to represent, but the said letter, Exhibit 1, was actually given on August 22, 1951 rather than

August 17, 1951. Lotz did not hold any trust funds for Mid-States, and therefore Lotz did not wrongfully abandon to other defendants control over any trust funds belonging to Mid-States, nor did defendants or any of them divert from Mid-States to or for the benefit of American Fidelity or American Plan any trust funds held or received by Lotz as trustee for Mid-States.

By November 1, 1951 the indebtedness of Lotz to American Fidelity had been reduced to approximately \$61,000.00, but said reduction was not made or accomplished by virtue of the diversion to American Fidelity or American Plan of any trust funds belonging to Mid-States. When American Fidelity and Mid-States entered into the agreement for the cancellation and rewriting of said insurance of the premium value of \$61,000.00, as above referred to in these findings, defendants did not know that Lotz would be unable to pay Mid-States the premiums that would be payable to Mid-States thereunder. Defendants were not guilty of any fraudulent concealment or affirmative misrepresentations in respect to said transaction of cancellation and rewriting of insurance, and neither Mid-States nor Anglo Bank suffered any deception in respect of said transaction nor did either of them rely on any of said representations in entering into said contract. Shortly after said contract was entered into, American Fidelity cancelled its said insurance in accordance therewith, and its avoidance of obligations under such insurance and the shifting of said obligations to Mid-States were not wrongful but

were in accordance with the terms of said contract. In the extinction of Lotz's obligation to American Fidelity by virtue of said transaction, no wrong was exercised against Mid-States or Anglo Bank.

From approximately August 13, 1951, American Fidelity and American Plan for the purpose of ensuring the payment of the debt due it by Lotz, exerted great pressure on Lotz to collect the amount due from Lotz to them, but said defendants did not induce Lotz to pay excess commissions for insurance business, and said pressure was not a part of any plan or conspiracy to defraud Mid-States or Anglo Bank, nor as a part of any plan or conspiracy to defraud did Lotz pay commissions which were in excess of the amount to be received by him as his general agency commission. Because of loss ratio on business written by Lotz in 1951 and because of Lotz's commissions paid by Lotz on said business and his other expenses, Lotz suffered losses which further increased the amounts owed by him to Mid-States, but Mid-States was aware of the said loss ratios and of the fact that Lotz was paying such commissions and other expenses, and no concealment or misrepresentation was exercised by American Plan or American Fidelity against Mid-States or Anglo Bank in that connection. Lotz was not induced or compelled by virtue of pressure or influence exercised on him by American Fidelity or American Plan to accept insurance business of a sub-standard class. No underwriting loss of Mid-States was due to any fraud or conspiracy as alleged in the complaint or complaint in intervention

or at all or to any business written by Lotz for Mid-States due to any such fraud or conspiracy.

XV.

Shortly prior to December 1, 1951 Mid-States learned that Lotz would be unable to pay the amount that would be due Mid-States on December 1, 1951 but owing to the condition of Lotz's books the financial condition of Lotz and his ability to pay his debts were not then known. Neither Mid-States nor Anglo Bank ever learned of a plan or conspiracy of defendants to defraud or deceive it or of any acts pursuant thereto, because no such plan existed.

On December 18, 1951 Mid-States wrote Lotz terminating his agency with Mid-States effective as of January 21, 1952.

Thereafter demand was made by Mid-States on defendants for damages because of the matters alleged in the complaint but defendants refused and still refuse to pay the sums demanded or any portion thereof.

Lotz is unable to pay to Mid-States the sum demanded by it.

XVI.

Mid-States has not been damaged in the sum of \$297,097.91 or in any other sum as a result of any plan or conspiracy of defendants to defraud it or of any acts done, permitted, directed or suffered by defendants pursuant thereto.

XVII.

Defendants have not been guilty of any fraud or deceit and have not been actuated by any malice towards Mid-States.

XVIII.

About the 31st day of August, 1951, Joseph Lotz opened a commercial account with Anglo Bank at its office at 1450 Broadway, Oakland, California, entitled "Joe Lotz, Trustee", and thereafter proceeded to endorse and deposit therein various checks made payable to the order of Mid-States, which Joseph Lotz represented and warranted to Anglo Bank he was authorized to endorse on behalf of Mid-States, among which were the following drawn by Public Service Insurance Co. on Pacific National Bank of San Francisco:

Check No.	Date of Check	Amount	Date of Deposit
3590	Sept. 7, 1951	\$ 5,547.25	Sept. 11, 1951
3611	Sept. 14, 1951	67,500.00	Sept. 18, 1951
3628	Sept. 24, 1951	11,250.00	Sept. 25, 1951
3660	Sept. 28, 1951	3,750.00	Oct. 1, 1951
3699	Oct. 15, 1951	6,089.44	Oct. 16, 1951

and among which was the following drawn by George R. Fulmore on Bank of America, National Trust and Savings Association:

Check No.	Date of Check	Amount	Date of Deposit
980	Nov. 16, 1951	\$ 1,484.65	Nov. 20, 1951

and among which were the following drawn by Jackson Motor Sales on the Anglo California National Bank, Chico, California:

Check No.	Date of Check	Amount	Date of Deposit
4868	Oct. 13, 1951	\$ 1,000.00	Oct. 18, 1951
4902	Nov. 10, 1951	800.00	Nov. 15, 1951

XIX.

On the 28th day of February, 1952, Mid-States commenced an action in this court entitled "Mid-States Insurance Company, a corporation, Plaintiff, vs. The Anglo California National Bank of San Francisco, a national banking association, Defendant", and numbered 31311 on the records and files of this court, alleging therein that while Lotz had authority to receive the above checks, he had no authority to endorse them for Mid-States, and prayed for a judgment against Anglo Bank for the amount thereof, plus certain other checks, with interest thereon at the rate of seven per cent (7%) per annum, and costs of suit incurred therein.

XX.

At the time the said checks were endorsed and deposited by Lotz as aforesaid, Anglo Bank believed that he was authorized to endorse and deposit the same. Thereafter Anglo Bank was advised and informed by Mid-States that Lotz had no authority to endorse checks made payable to Mid-States and that defendants had entered into a plan and conspiracy to deceive and defraud as above referred to and had committed the various alleged acts pursuant thereto, and until such time Anglo Bank had no knowledge, information or belief concerning said alleged matters.

It is not true that at all of the times mentioned in the complaint in intervention defendants knew that Joseph Lotz was insolvent and unable to meet his obligations.

XXI.

The checks referred to in paragraph XVIII of these findings constituted premiums on insurance written for Mid-States by Lotz. Mid-States claims that said funds were wrongfully diverted by Lotz from Mid-States and the amount thereof constitutes part of the claim made by Mid-States against defendants herein.

XXII.

The issues between Mid-States and Anglo Bank in Action No. 31311 were tried before the above entitled court. In the pleadings in said case and at the trial of said issues Anglo Bank defended against the claim of Mid-States on the ground that Lotz had authority to endorse said checks and on the ground of estoppel and other grounds. After said trial the case was submitted to the trial judge for his decision, and while the case was thus under submission and without any decision thereof Anglo Bank consented to the entry of a judgment against it of \$37,500.00, and accordingly such a consent judgment was entered therein.

XXIII.

Anglo Bank has not been damaged to the extent of said sum of \$37,500.00, or any other sum, as a result of any plan or conspiracy of defendants to defraud and deceive or as a result of any acts done, permitted, directed or suffered by defendants herein pursuant to any such plan or conspiracy or otherwise.

In representing that he had authority to endorse said checks, Lotz believed he had such authority and did not intend to deceive Anglo Bank, nor did any other defendant have any such intention, nor did Lotz or any other defendant think that Anglo Bank would be exposed to any liability to Mid-States in accepting or acting on such endorsement.

XXIV.

Defendants have not been guilty of any fraud or deceit and have not been actuated by malice towards Anglo Bank.

XXV.

Any and all allegations contained in the pleadings herein which may be inconsistent with the findings herein contained are untrue.

XXVI.

Where reference is made in these findings to the complaint in intervention, such reference shall be deemed also to include the third party complaint in Action No. 31311 which consists substantially of the same allegations as the complaint in intervention.

XXVII.

No evidence having been offered in support of the counter-claim of defendant Lotz or of the counter-claims of American Fidelity and American Plan, said defendants are not entitled to take anything by way of said counter-claims.

From the foregoing facts, the Court concludes:

Conclusions of Law

1. That plaintiff Mid-States Insurance Company take nothing by its complaint against defendants;

2. That The Anglo California National Bank of San Francisco, plaintiff in intervention in Action No. 31496 and third party plaintiff in Action No. 31311, take nothing by its complaint in intervention or its third party complaint against defendants and third party defendants;

3. That defendants and third party defendants Joseph Lotz, American Fidelity and Casualty Company, Inc. and The American Plan Corporation take nothing by their counter-claims against Mid-States Insurance Company and The Anglo California National Bank of San Francisco; and

4. That the respective parties pay their own costs.

Let judgment be entered accordingly.

Dated: December 16, 1954.

/s/ MICHAEL J. ROCHE,

Chief Judge, U. S. District Court

Acknowledgment of Service attached.

[Endorsed]: Filed December 16, 1954.

In the United States District Court, Northern District of California, Southern Division

No. 31496

MID-STATES INSURANCE COMPANY, etc.,
Plaintiff,
THE ANGLO CALIFORNIA NATIONAL
BANK OF SAN FRANCISCO, etc.,
Plaintiff in Intervention,

vs.

AMERICAN FIDELITY AND CASUALTY
COMPANY, INC., etc., et al.,
Defendants and Third Party Defendants.

JUDGMENT

The above entitled cause came on regularly for trial on May 3, 1954, before the above entitled Court, Honorable Michael J. Roche, Chief Judge, presiding, sitting without a jury, and the trial of said action proceeded on said day and succeeding days upon the issues presented by the pleadings; and proof having been presented on behalf of the respective parties, and the parties having appeared by their respective attorneys, except defendant Ralph L. Smead who appeared in propria persona, and the Court being fully advised in the premises, and an opinion dated October 11, 1954 having been rendered, and Findings of Fact and Conclusions of Law having been made by the Court,

It Is Hereby Ordered, Adjudged and Decreed:

1. That plaintiff take nothing by its complaint herein;

2. That Plaintiff in Intervention take nothing by its complaint in intervention herein or by its third party complaint in Action No. 31311;

3. That defendant Joseph Lotz take nothing by way of his counter-claim herein;

4. That defendants American Fidelity and Casualty Company, Inc. and The American Plan Corporation take nothing by way of their counter-claims herein;

5. That each party pay its own costs.

/s/ MICHAEL J. ROCHE,

Chief Judge, U. S. District Court

Entered in Civil Docket Dec. 17, 1954.

[Endorsed]: Filed Dec. 16, 1954.

[Title of District Court and 'Causes 31496-31311.]

MOTION FOR NEW TRIAL, MOTION FOR
MODIFICATION OF FINDINGS OF FACT
AND CONCLUSIONS OF LAW AND MO-
TION TO ALTER AND AMEND JUDG-
MENT AND NOTICE OF HEARING
THEREOF

To defendant Ralph L. Smead appearing in propria persona, and to the other defendants above-named and their respective attorneys:

You and each of you will please take notice that plaintiff, Mid-States Insurance Company, a corpor-

ation, and Plaintiff in Intervention, The Anglo California National Bank of San Francisco, a national banking association, by their undersigned attorneys move the above-entitled Court for a new trial in the above-entitled cause, for a modification of the findings of fact and conclusions of law therein and to alter and amend the judgment therein and that the said motions will be heard on Thursday the 6th day of January, 1955, at the hour of 10:00 o'clock a.m. on said day or as soon thereafter as counsel may be heard before the Honorable Michael J. Roche, Chief Judge of said Court in Room 338 of the United States Post Office Building, Seventh and Mission Streets, San Francisco, California.

Said motion will be based upon the files and records in said proceeding and upon the Memorandum on Motion for New Trial, etc., hereunto annexed.

Dated: December 27, 1954.

/s/ WALLACE, GARRISON, NORTON
& RAY

/s/ MAYNARD GARRISON
Attorneys for Plaintiff, Mid-States
Insurance Company.

/s/ SEVERSON, McCALLUM & DAVIS
/s/ ALMON McCALLUM

Attorneys for Plaintiff in Intervention, The Anglo
California National Bank of San Francisco.

MEMORANDUM

Plaintiff and plaintiff-in-intervention respectfully present their grounds for motions heretofore made

to the Court for a new trial for modification and amendments to findings of fact and conclusions of law and for alteration and amendment of the judgment.

So far as material hereto, Rule 59(a) F.R.C.P. provides as follows:

“A new trial may be granted to all or any of the parties and on all or part of the issues * * * in a case tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered * * * amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.”

Motion for a new trial in a cause tried before the Court was intended to be the equivalent of a petition for a rehearing.

Notes of Advisory Commission on Rules 28, U.S.C.A., Rule 59, page 271.

It is the position of plaintiff and plaintiff-in-intervention herein that this cause should be reheard and redetermined first, for the reason that the Court in its written opinion considered the impact of the testimony produced at the trial upon only one of the legal issues. That was the issue of conspiracy.

Two legal bases were before the Court and argued

in the briefs on behalf of the plaintiff. The one which the Court has failed to rule upon is that brought about by the conceded breach by defendant Lotz of his fiduciary duties to Mid-States Insurance Company and the knowing participation therein by the other defendants. It is respectfully requested that this Court consider the evidence in the light of this alternative ground upon which relief might have been afforded to the plaintiff and to the plaintiff-in-intervention.

Clearly, plaintiff and plaintiff-in-intervention were entitled to recover upon any theory which the facts justified regardless of the demand in the pleadings.

Hammel vs. Maryland Casualty Co. (1954)
209 F(2d) 338.

Should the Court feel that amendment to conform to proof is necessary oral motion for such amendment will be duly made at the time the written motions are heard.

Secondly, there is no dispute that defendant Lotz diverted fiduciary funds belonging to the plaintiff and it is respectfully submitted that the Court erred in giving judgment in his favor and against the plaintiff and plaintiff-in-intervention.

It is therefore requested that this Court grant plaintiff's motion for rehearing or in the event that motion be not granted, amend the findings of fact in accordance with the proposed amendments attached hereto and amend the judgment by entering

judgment in favor of plaintiff and plaintiff-in-intervention and against the defendants herein.

Respectfully submitted,

/s/ WALLACE, GARRISON, NORTON
& RAY

Attorneys for Plaintiff, Mid-States
Insurance Company.

/s/ SEVERSON, McCALLUM & DAVIS
/s/ ALMON McCALLUM

Attorneys for Plaintiff in Intervention, The Anglo
California National Bank of San Francisco.

Proposed Amendments by Mid-States Insurance
Company, a Corporation, Plaintiff, and the
Anglo California National Bank of San Francisco, a National Banking Association, Plaintiff in Intervention, to Findings of Fact and Conclusions of Law as Proposed by Defendants American Fidelity and Casualty Company, Inc., a Corporation, and the American Plan Corporation, a Corporation.

Comes Now Mid-States Insurance Company, a corporation, Plaintiff, and The Anglo California National Bank of San Francisco, a national banking association, Plaintiff in Intervention, and each severally propose the following amendments to the Findings of Fact and Conclusions of Law as heretofore served and filed by defendants.

I.

Amend Finding II, page 3, by inserting in line 32, after the word "agencies" the following:

"prior to September 1, 1951."

2.

Amend Finding II, by inserting after line 24, on page 4, the following:

"Said new Agency Agreement provided that 'All premiums received by the Agent shall be held by such Agent as trustee for the Company. The privilege of taking commissions provided in Paragraph '9' of this agreement from premiums received by such Agent shall not be construed as changing the relationship of the respective parties hereto or of the fact that the premiums received are trust funds. The keeping of an account with the Agent on the Company's books, as a creditor and debtor account, is declared a record memorandum of business transacted, and neither such keeping of account, nor alteration in compensation rate, nor failure to enforce prompt remittance or compromise or settlement or declaration of balance of account, shall be held to waive the understanding that the premiums collected by the Agent are trust funds or change the character of such premiums.' "

3.

Amend Finding III, page 5, by adding on line 8 after the word "indebtedness":

"That a portion of the monies paid American Fidelity during this period were premiums collected

by Lotz for policies of insurance written in Mid-States.”

4.

Amend Finding III, page 5, by adding after line 18, the following:

“Upon the completion of the liquidation of Lotz’ indebtedness to American Fidelity his indebtedness to Mid-States had increased from approximately \$30,000 on August 1, 1951 to \$281,746.96; that said \$281,746.96 is the net amount loss sustained by Mid-States after crediting Lotz’s account with \$37,500 received from Anglo, Plaintiff in Intervention. That no part of either of said amounts have been paid.”

5.

Amend Finding IV, page 5, line 20, by inserting after “1951” the words: “after the meeting in New York.”

6.

Amend Finding IV, page 6, by deleting after the word “such” on line 3 through line 9, and insert in their place the following:

“The policies involved in the cancellation and re-writing of the Public Service policies, which were not reported to Mid-States until their cancellation and re-writing had been substantially completed. That Hatfield’s first knowledge of the cancelling and re-writing of the Public Service policies in Mid-States was the receipt by him two to three weeks later of a block of several hundred policies.”

7.

Amend Finding V, page 6, by deleting lines 21, 22, 2^c and 24, reading as follows:

“Both Lotz and Hatfield then thought the plan would succeed and Hatfield undertook to cooperate with Lotz in carrying it out. Thereafter during the month of December 1951 the plan was cancelled by Mid-States.”

And substitute the following in their place:

“Said plan was never accepted by Mid-States and was specifically rejected by it in December of 1951. That in the month of December 1951 Lotz and Smead advised Hatfield that they were insolvent. That that fact had been reported to The American Plan Corporation in August at their meeting in New York. That in addition, both Lotz and Smead gave written statements, Exhibits Pl 6, 11, 12, 13 and 14, setting forth in detail the subject matters discussed.”

8.

Amend Finding VI, page 6, line 31, by inserting:
“prior to September 1, 1951.”

9.

Amend Finding VI by adding to line 5 on page 8 the following:

“Mid-States did not know, nor did it ever authorize Lotz to use premiums collected on insurance written in Mid-States to pay for insurance written by Lotz in other companies.”

10.

Amend Finding VI, page 8, by inserting after the word “Lotz” on line 32, the words: “after September 1, 1951.”

11.

Amend Finding VI, page 9, by inserting after the word "agreements" on line 2, the words: "effective prior to September 1, 1951", and line 3 by inserting after the word "agency" the words: "prior to September 1, 1951."

12.

Amend Finding VI, page 9, by deleting lines 24 through 32, and lines 1 and 2 on page 10, and take in their place the words:

"That at all times while Lotz acted as the agent of Mid-States under contracts referred to he was familiar with the duties of an insurance agent in the State of California with respect to trustee funds."

13.

Amend Finding 7, on page 10 by adding at line 15 the words:

"That after April 1951 and until December 1951 Lotz's account with Mid-States was current and Mid-States had no knowledge that Lotz was insolvent or that he was using monies received by him on policies written in Mid-States to pay his account with American Plan and American Fidelity. That under the agent's agreement entered into September 1, 1951 it was Lotz's duty to receive all premiums on business written in Mid-States as its trustee and to maintain said trust funds in a trustee account created for that purpose. That it was not the duty or obligation of Mid-States to examine or audit Lotz's books excepting after notice that he was in-

solvent or had violated the terms of his contract.”

14.

Amend Finding 7 on page 10 by deleting lines 30 through line 5 on page 11 and adding in their place the following:

“The loss suffered by Mid-States was caused by the fact that Lotz, without its knowledge or consent used premium monies received by him on insurance written in Mid-States to pay his account with American Plan and American Fidelity for business written in those companies. Mid-States did nothing after September 1, 1951 that caused or contributed to any act of Lotz’ or to Mid-States loss. After September 1, 1951 Mid-States relied upon Lotz to perform his contract and to report any fact or suggestion involving a breach of his duty as their agent.”

15.

Amend Finding VIII, page 11, by deleting line 14, commencing with the word “said” to and including line 19 and inserting in their place the following: “That at all times it was possible for Lotz to determine from his records the approximate balance due companies on business written by him. That in addition to those records, Lotz was furnished monthly by each company statements of the balances due them on all business written.”

16.

Amend Finding VIII, page 11, by deleting line

23 commencing with the word "it" to and including line 26 and insert in their place the following:

"it is true that in August 1951 Lotz and Smead advised American Plan and American Fidelity at the meeting in New York that they did not have funds or assets sufficient to meet their liabilities, and that they could not make a payment then currently overdue to American Plan."

17.

Amend Finding VIII, page 11 by striking the words commencing with "nor" on line 28 to and including line 30.

18.

Strike Finding X, on page 12, line 17 to and including line 21.

19.

Amend Finding XII, on page 13, by inserting on line 4, after the word "premiums" the words: "prior to September 1, 1951."

20.

Amend Finding XIV, on page 15, at line 4, by inserting after the word "mentioned" the following:

"That during the month of September 1951 Lotz entered into an agreement with the Public Service Insurance Co. whereby a block of policies previously written by that company would be cancelled and re-written in Mid-States. That upon said cancellation and re-writing, Public Service paid to Lotz the unearned premiums on said policies as alleged, in the sum of approximately \$97,000.00. That all of said premiums were deposited by Lotz in his bank account with Anglo as trustee, and

thereafter all or substantially all of said monies were withdrawn from said trustee account and paid to the American Fidelity and American Plan. That Hart knew that said cancellation and re-writing of the block of policies had taken place and also knew that his company had no right to receive or participate in any part of said premiums.”

21.

Amend Finding XIV, on page 16, by inserting before the word “by” on line 16 the following words: “prior to September 1.”

22.

Amend Finding XIV on page 16 by inserting after line 29 the following:

“Said Exhibit ‘1’ dated August 17, 1951 contained the following instructions by American Plan to its agent Smead as follows: ‘As the representative of this corporation, you have full authority to deposit to the account of The American Fidelity and Casualty Company at the Central Bank in Oakland all monies received by Lotz after taking into consideration the deduction prescribed in said agreement. You are to have full and supreme authority regarding financial affairs of Joseph Lotz, subject to instructions that may be transmitted to you from time to time by the American Plan Corporation, and in the event that you are prevented from performing your responsibility in any respect it will be your duty to notify immediately the American Plan Corporation.’ ”

23.

Amend Finding XIV, on page 17, by inserting in line 2 after the word "Mid-States" the following:

"Said reduction was accomplished at least in part by the payment to American Fidelity and American Plan of monies received by Lotz in the form of premiums on policies written in Mid-States."

24.

Amend Finding XV, on page 18 by adding to line 22 the following:

"Lotz and Smead did, however, in December of 1951 state to Hatfield that they had entered into a conspiracy with American Plan and American Fidelity and that they had commenced with the 14th day of August to divert monies received by Lotz for premiums on policies written in Mid-States to American Fidelity."

25.

Amend Finding XV, page 18 by adding after line 30 the following:

"Lotz's inability to pay Mid-States the balance due on his account results from the fact that substantial portions of monies received by him from policies written in Mid-States were paid to American Fidelity in liquidation of his account with it."

26.

Amend Finding XVIII, on page 19 by inserting at line 12 after the word "Lotz" the following:

"and Ralph Smead."

27.

Amend Finding XXI, page 20, by deleting line 26 commencing with the word "Mid-States" to and including line 28, and inserting in its place the following:

"The monies received by Lotz from said checks were substantially diverted by Lotz from Mid-States and paid to American Fidelity."

28.

Amend Finding XXIII, page 21 by deleting on line 16 the words "believed he had such authority and did not" and inserting in place thereof the following:

"and Smead knew they did not have authority and they did."

29.

Further amend said Paragraph XXIII, page 21, by deleting line 18 commencing with the word "nor" through and including line 20.

30.

Amend Finding XXIV, page 21, by deleting lines 22 and 23 and substitute the following:

"On August 27, 1951 Joe Lotz wrote Mid-States asking for authority to endorse checks payable to Mid-States. On August 31, 1951 Joe Lotz opened a trustee account with Anglo Bank and at that time told Anglo Bank he had authority to endorse checks payable to Mid-States and would deliver to Anglo Bank evidence of his authority to endorse such checks. On September 5, 1951 Mid-States wrote

Lotz refusing to grant him authority to endorse checks payable to Mid-States; that Lotz never advised Anglo Bank that Mid-States had refused him permission to endorse checks payable to his order; that on several occasions following receipt of Mid-States letter dated September 5, 1951, Smead told Anglo Bank that Lotz had authority to endorse checks payable to Mid-States. That the checks referred to in Finding XVIII were deposited by Lotz with Anglo Bank after Lotz and Smead had been advised by Mid-States that they had no authority to endorse checks payable to Mid-States. That Lotz and Smead are guilty of misrepresenting to Anglo-Bank the authority of Lotz to endorse checks payable to Mid-States and guilty of concealing from Anglo Bank the refusal of Mid-States to give Lotz authority to endorse its checks. That at all such times of telling Anglo Bank that Lotz had authority to endorse checks of Mid-States, Smead was the agent of American Fidelity and American Plan and acting within the scope of his agency. That as a result of such misrepresentation and deceit Anglo Bank has been damaged in the sum of \$37,500."

Respectfully submitted,

WALLACE, GARRISON, NORTON
& RAY and LEWIS SCHIMBERG
SEVERSON, McCALLUM & DAVIS

/s/ By MAYNARD GARRISON

/s/ ALMON McCALLUM

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 27, 1954.

[Title of District Court and Causes 31496-31311.]

ORDER

Order Denying Motions for New Trial, for Modification of Findings of Fact and Conclusions of Law and to Alter and Amend Judgment.

Plaintiff, Mid-States Insurance Company, and plaintiff in intervention, defendant and third party plaintiff, The Anglo California National Bank of San Francisco, having moved this Court for a new trial in the above-entitled cause, for a modification of the findings of fact and conclusions of law therein and to alter and amend the judgment therein, and said motions having duly come on to be heard on the 13th day of January, 1955, now therefore,

It Is Hereby Ordered that the said motions be and the same are hereby in all respects denied.

/s/ MICHAEL J. ROCHE

Chief Judge, United States District Court.

[Endorsed]: Filed January 24, 1955.

[Title of District Court and Causes 31496-31311.]

NOTICE OF APPEAL TO COURT OF APPEALS UNDER RULE 73(b)

Notice is hereby given that Mid-States Insurance Company, a corporation, plaintiff above named in action numbered 31496, and The Anglo California National Bank of San Francisco, a national bank-

ing association, plaintiff in intervention in action numbered 31496, and third-party plaintiff in action numbered 31311, hereby severally appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in the above consolidated action on December 17, 1954.

Dated: San Francisco, January 27, 1955.

LEWIS SCHIMBERG,
MAYNARD GARRISON,
JOHN R. PASCOE,
WALLACE, GARRISON, NORTON
& RAY

By MAYNARD GARRISON,

Attorneys for Plaintiff

ALMON McCALLUM

SEVERSON, McCALLUM & DAVIS

By ALMON McCALLUM,

Attorneys for Plaintiff in Intervention, Defendant
and Third Party Plaintiff The Anglo Califor-
nia National Bank of San Francisco.

[Endorsed]: Filed February 7, 1955.

[Title of District Court and Causes 31496-31311.]

STATEMENT OF POINTS

The points upon which plaintiff-appellant Mid-States Insurance Company (hereinafter referred to as "Mid-States") intends to rely on this appeal are as follows:

(1) The court erred in entering judgment that plaintiff take nothing by its complaint.

(2) The court erred in failing to find that Joseph Lotz (hereinafter referred to as "Lotz") was indebted to Mid-States in the sum of \$281,746.96, as to which there was no conflict in the evidence.

(3) The court erred in finding that Mid-States permitted Lotz to use premiums collected by him for Mid-States to pay his operating expenses, personal drawings and sub-agent's commissions after September 1, 1951. (Finding VI.)

(4) The court erred in finding that the funds collected by Lotz for Mid-States merely constituted a debt in that amount rather than trust funds. (Findings VI, XII and XIV.)

(5) The court erred in concluding that Mid-States' new agency agreement with Lotz (dated September 1, 1951) was modified so that premiums collected by Lotz for Mid-States were not trust funds. (Finding VI.)

(6) The court erred in holding that Lotz was not guilty of concealment of any facts which he was under a duty to disclose to Mid-States and that Mid-States did not rely on any non-disclosures by Lotz. (Findings VII and XIV.)

(7) The court erred in refusing to hold that defendant Lotz had violated his fiduciary duties as agent of Mid-States and that the remaining defendants had participated in such breach.

(8) The court erred in finding that the statements made by the president of The American Plan Corporation (hereinafter referred to as "American Plan") to the vice president and general manager of Mid-States on or about November 1, 1951 regarding the rewriting by Mid-States of insurance being cancelled by American Fidelity and Casualty Company, Inc. (hereinafter referred to as "American Fidelity") were not made with intent to deceive or defraud, that said statements were not relied upon by Mid-States, that no fraud or deceit was practiced by American Fidelity or American Plan with respect to said contract and that the same was not part of any plan by defendants to defraud Mid-States. (Finding IX.)

(9) The court erred in finding that the re-writing by Lotz of insurance previously written by him for American Fidelity was not done for the purpose of enabling American Fidelity to reduce the amount of otherwise uncollectible indebtedness due it from Lotz at the expense of Mid-States. (Finding XIV.)

(10) The court erred in holding that defendants did not engage in a conspiracy to defraud plaintiff. (Finding IX, XII, XIII, XIV and XVII.)

(11) The court erred in finding that defendants did not know of Lotz' insolvency prior to December, 1951 (Finding VIII) or that Lotz would be unable to meet his obligations to Mid-States. (Finding XIV.)

(12) The court erred in failing to find that Lotz was insolvent on and after August 1, 1951 and that the defendants at all times thereafter believed him to be insolvent.

(13) The court erred in finding that by the written agreement dated August 22, 1951, between American Fidelity, American Plan and Lotz, Smead was given control over the finances of the Lotz agency only as they pertained to the payment to American Fidelity of the obligation owed that firm by Lotz. (Finding XIV.)

(14) The court erred in failing to find that Smead was the agent of American Fidelity and American Plan and had full and complete control and authority over the financial affairs of Lotz and his agency and in failing to find that while acting as their agent he wrongfully diverted funds belonging to Mid-States to defendants American Fidelity and American Plan.

(15) The court erred in finding that the reduction of the indebtedness of Lotz to American Fidelity to approximately \$61,000 by November 1, 1951 was not accomplished by virtue of the wrongful diversion to American Fidelity or American Plan of funds belonging to Mid-States. (Finding XIV.)

(16) The court erred in holding that Mid-States suffered no loss due to any fraud or conspiracy of defendants. (Finding XIV.)

(17) The court erred in denying Mid-States' Mo-

tion for New Trial, for Modification of Findings of Fact and Conclusions of Law and to Alter and Amend Judgment.

/s/ LEWIS SCHIMBERG,

/s/ MAYNARD GARRISON,

/s/ WALLACE, GARRISON, NORTON
& RAY,

Attorneys for Plaintiff Mid-States Insurance Company.

Acknowledgment of Service attached.

[Endorsed]: Filed March 7, 1955.

[Title of District Court and Causes 31496-31311.]

DESIGNATION BY MID-STATES
INSURANCE COMPANY

To: The Clerk of the United States District Court
for the Northern District of California, Southern Division:

Mid-States Insurance Company, plaintiff and appellant, hereby designates the following in this consolidated case to be contained in the record on appeal:

1. The complaint of Mid-States Insurance Company in action number 31496 and the exhibits thereto attached;

2. Answer of defendant Ralph L. Smead in action number 31496;

3. Pages One, Two and down to line Six of page Three of the Answer of defendant Joseph Lotz in action number 31496;

4. Answer of defendants American Fidelity and Casualty Company, Inc., and The American Plan Corporation in action number 31496;

5. The transcript of the testimony, appearances and all the evidence and exhibits introduced at the trial of the consolidated actions;

6. Opinion dated October 11, 1954;

7. Findings of Fact and Conclusions of Law;

8. Judgment entered December 17, 1954;

9. Motion for New Trial, for Modification of Findings of Fact and Conclusions of Law and to Alter and Amend Judgment and Notice of Hearing Thereof; Memorandum, and Proposed Amendments by Mid-States Insurance Company and The Anglo California National Bank of San Francisco to Findings of Fact and Conclusions of Law attached to said Motion;

10. Order Denying Motions for New Trial, for Modification of Findings of Fact and Conclusions of Law and to Alter and Amend Judgment;

11. Notice of Appeal;

12. Statement of Points on Appeal by plaintiff.

13. This designation of contents of record on appeal.

/s/ LEWIS SCHIMBERG,

/s/ MAYNARD GARRISON,

/s/ WALLACE, GARRISON, NORTON
& RAY,

Attorneys for Plaintiff Mid-States
Insurance Company.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 7, 1955.

[Title of District Court and Causes 31496-31311.]

STIPULATION FOR THE TRANSMITTAL OF
ORIGINAL EXHIBITS

It is stipulated by and between the parties hereto through their attorneys of record that the exhibits in the above-entitled causes, as consolidated, may be transmitted in their original form to the Clerk of the United States Court of Appeals for the Ninth Circuit for the use by that Court in their consideration of this appeal.

/s/ LEWIS SCHIMBERG,
/s/ MAYNARD GARRISON,
/s/ WALLACE, GARRISON, NORTON
& RAY,

Attorneys for Plaintiff Mid-States Insurance Company.

/s/ SEVERSON, McCALLUM & DAVIS,
/s/ ALMON McCALLUM,

Attorneys for Plaintiff in Intervention, The Anglo-California National Bank of San Francisco.

/s/ HAROLD R. McKINNON,
/s/ BRONSON, BRONSON &
McKINNON,

Attorneys for Defendants American Fidelity and Casualty Company, Inc., The American Plan Corporation, Inc.

/s/ RICHARD F. TIEDEMAN,
/s/ PETER D. KAKURES,

Attorneys for Defendant Joseph
Lotz.

ORDER FOR TRANSMITTAL OF ORIGINAL
EXHIBITS

It is ordered that the Clerk of this Court shall transmit to the Clerk of the United States Court of Appeals for the Ninth Circuit the original exhibits in the above-entitled cases, to be safely kept by the said Clerk for the use of that Court in the consideration of this appeal, and thereafter to be returned by him to this Court.

Dated: March 9th, 1955.

/s/ MICHAEL J. ROCHE,
Chief Judge, United States District
Court.

[Endorsed]: Filed March 8, 1955.

[Title of District Court and Causes 31496-31311.]

DESIGNATION BY APPELLANT THE
ANGLO CALIFORNIA NATIONAL BANK
OF SAN FRANCISCO

To: The Clerk of the United States District Court
for the Northern District of California, South-
ern Division:

The Anglo California National Bank of San Francisco, a national banking association, plaintiff in intervention and defendant and third party plaintiff and appellant, hereby designates the following in this consolidated case to be contained in the record on appeal to supplement the designation

filed by appellant Mid-States Insurance Company:

1. Complaint in Intervention in action number 31496.

2. Answer of defendants American Fidelity and Casualty Company, Inc., a corporation, and the American Plan Corporation, a corporation, to Complaint in Intervention in action number 31496.

3. Complaint in action number 31311.

4. Answer in action number 31311.

5. Third Party Complaint in action number 31311.

6. Answer of third party defendants American Fidelity and Casualty Company, Inc., a corporation, and The American Plan Corporation, a corporation, to Third Party Complaint in action number 31311.

7. Answer of third party defendant Ralph L. Smead to Third Party Complaint in action number 31311.

8. Answer of third party defendant Joseph Lotz to Third Party Complaint in action number 31311.

9. Amendment to Answer of third party defendants American Fidelity and Casualty Company, Inc., a corporation, and The American Plan Corporation, a corporation, to Third Party Complaint in action number 31311.

10. Amendment to Answer in action number 31311.

11. Amendment to Complaint in action number 31311.

12. Statement of Points on Appeal by appellant, The Anglo California National Bank of San Francisco, a national banking association.

13. This designation of contents of record on appeal.

SEVERSON, McCALLUM & DAVIS

/s/ By NATHAN BERKE,

Attorneys for Appellant The Anglo California National Bank of San Francisco, a national banking association.

[Endorsed]: Filed March 9, 1955.

[Title of District Court and Causes 31311-31496.]

STATEMENT OF POINTS OF APPELLANT,
THE ANGLO CALIFORNIA NATIONAL
BANK OF SAN FRANCISCO

Comes Now, the above-named Appellant and states and specifies as the points on which he intends to rely in his appeal in the above-entitled cause, the following, to-wit:

1. The District Court erred in finding, holding and concluding that under the evidence plaintiffs had not sustained the burden of proving a conspiracy to defraud on the part of the defendants.

2. The District Court erred in refusing to credit the testimony of witnesses Smead and Lotz and their written statements.

3. The District Court erred in finding, holding

and concluding that the fundamental basis of plaintiffs' case is the written statements of Smead and Lotz.

4. The District Court erred in finding, holding and concluding that there was no trust relationship between defendant Joseph Lotz and plaintiff, Mid-States Insurance Company.

5. The District Court erred in finding, holding and concluding that plaintiff, The Anglo California National Bank of San Francisco (hereinafter referred to as the "Bank"), has no right of recovery against the defendants.

6. The District Court erred in finding, holding and concluding that plaintiffs' case rested solely on the theory of conspiracy.

7. The District Court erred in failing to find, hold and conclude that the defendants Lotz and Smead, and defendants American Federal and Casualty Company, Inc. and The American Plan Corporation through their agent Smead, had made misrepresentations to plaintiff, the Bank.

8. The District Court erred in denying plaintiffs' motion to modify the findings of fact and conclusions of law and to alter and amend the judgment.

9. The District Court erred in denying plaintiffs' motion for a new trial.

10. The District Court erred in entering judgment that plaintiffs take nothing by their complaints.

11. The District Court erred in failing to enter judgment for the plaintiffs as prayed for in their complaints.

Dated: March 8th, 1955.

SEVERSON, McCALLUM & DAVIS

/s/ By NATHAN BERKE,

Attorneys for Plaintiff-Appellant, The Anglo California National Bank of San Francisco.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 9, 1955.

[Title of District Court and Causes 31311-31496.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and that they constitute the record on appeal herein as designated by the attorneys for the appellants;

Complaint; Answer of Deft. Joseph Lotz.

Answer of Deft. Ralph L. Smead in action No. 31496.

Answer of Defts. American Fidelity & Casualty Co., Inc., et al in Cause No. 31496.

Complaint in Intervention in action No. 31496.

Answer of Defts. American Fidelity & Casualty Co., Inc., et al in Cause No. 31496.

Opinion in Cause No. 31496.

Findings of Fact and Conclusions of Law in Cause No. 31496.

Judgment in Cause No. 31496 (Consolidated with No. 31311).

Motion for new trial, for modification of Findings, etc. in Cause No. 31496 and 31311.

Order denying motions for new trial, etc., in Cause No. 31496 and 31311.

Notice of appeal by Mid-States Ins. Co. in Cause No. 31496.

Notice of Appeal by Anglo California National Bank in Cause No. 31496 and 31311.

Statement of Points by Mid-States Ins. Co. in Cause 31496.

Order for Transmittal of Original Exhibits in Cause 31496.

Stipulation obviating filing of further copies of reporter's transcript on appeal.

Cost bond on appeal of Anglo Calif. Nat'l Bank.

Cost bond on appeal of Mid-States Ins. Co.

Complaint in Cause No. 31311.

Answer of Deft. Anglo Calif. Bank in Cause No. 31311.

Third Party Complaint.

Answer of Third Party Defts. American Fidelity & Casualty Co., Inc., et al to Third Party Complaint.

Answer of Third Party Deft. Joseph Lotz to Third Party Complaint in Cause 31311.

Amendment to Answer of Third Party Defts.

American Fidelity & Casualty Co., Inc., et al to
Third Party Complaint in Cause No. 31311.

Amendment to Answer of Anglo Calif. Bank in
Cause 31311.

Amendment to Complaint by Mid-States Ins. Co.
in 31311.

Designation of contents of record on appeal by
Mid-States Insurance Co. in 31496.

Designation of contents of record on appeal by
Anglo Calif. Bank in 31311 with statement of points
attached.

Cost bond on appeal by Anglo Calif. Bank in
Cause No. 31311.

Eleven volumes of Reporter's transcript of trial.
Plaintiff's Exhibits Nos. 1 through 41, inclusive.
Intervening Plaintiff's Exhibits 1 through 5, in-
clusive.

Defendant's Exhibits A through G and I through
S, inclusive.

Defendant's Exhibit H for identification only.

In Witness Whereof, I have hereunto set my
hand and affixed the seal of said District Court this
19th day of March, 1955.

[Seal] C. W. CALBREATH,
Clerk.

/s/ By WM. C. ROBB,
Deputy Clerk

In the United States District Court for the Northern District of California, Southern Division

No. 31496

MID-STATES INSURANCE COMPANY, etc.,
Plaintiff,

vs.

THE ANGLO CALIFORNIA NATIONAL
BANK OF SAN FRANCISCO, etc.,
Plaintiff in Intervention,

vs.

AMERICAN FIDELITY AND CASUALTY
COMPANY, INC., etc., et al.,
Defendants.

TRANSCRIPT OF PROCEEDINGS

May 3 to 18, 1954

Before: Hon. Michael J. Roche, Judge.

Appearances: For the Plaintiffs: Mid-States Insurance Company: Wallace, Garrison, Norton & Ray, by Maynard Garrison, Lewis Schimberg; The Anglo California National Bank of San Francisco: Severson, McCallum & Davis, by Almon McCallum, Nathan Berke. For the Defendants: American Fidelity and Casualty Company, Inc.: Bronson, Bronson & McKinnon, by E. D. Bronson, Harold McKinnon; Joseph Lotz; Peter Kakures, Richard Tiedeman; Ralph Smead: Pro Persona. [1*]

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

The Clerk: Mid-States Insurance Company vs. Anglo California National Bank, American Fidelity and Casualty Company, for trial.

Mr. Garrison: Ready for the plaintiff.

Mr. McCallum: Ready for the Anglo Bank.

Mr. Bronson: Ready.

The Clerk: Will counsel state your respective appearances, please.

Mr. Garrison: Mr. Lewis Schimberg and Maynard Garrison, of Wallace, Garrison, Norton and Ray, representing plaintiff Mid-States Insurance Company.

Mr. Berke: Nathan Berke, Almon McCallum of Severson, McCallum and Davis, representing the Anglo Bank.

Mr. Tiedeman: For defendant Joseph Lotz, Richard F. Tiedeman, Peter D. Kakures.

Mr. Bronson: For the defendants American Fidelity and Casualty Company, Incorporated, a corporation, and the defendant the American Plan Corporation, a corporation, the firm of Bronson, Bronson and McKinnon, and attending here at trial, if the Court please, Mr. Harold McKinnon and I, E. D. Bronson.

Mr. McCallum: Your Honor, Mr. Smead asked me to advise you, Mr. Ralph Smead, that he appears in pro per. He is sitting there behind the rail.

The Court: Proceed.

(Whereupon an opening statement was made by Mr. Garrison; reported but not transcribed.)

* * * * *

(Whereupon an opening statement was made by Mr. McCallum; reported but not transcribed.)

* * * * *

(Whereupon an opening statement was made by Mr. Bronson; reported but not transcribed.)

* * * * *

(Whereupon an adjournment was taken to 2:00 o'clock this day.) [4]

Mr. Garrison: I didn't understand whether or not counsel for Mr. Lotz decided to make an opening statement.

Mr. Berke: Your Honor, as one of the counsel for co-defendant Lotz, I would like to reserve our opening statement until such time as we put on our case. I might add that my associate and I came into this thing at a late date.

The Court: Very well.

Mr. Garrison: Call Mr. Hatfield as the first witness, Your Honor.

GERALD A. HATFIELD

a witness called on behalf of the plaintiff herein, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Court: Your full name, please? Be seated.

The Witness: Gerald A. Hatfield.

The Court: Where do you reside?

The Witness: Chicago, Illinois.

The Court: Your business or occupation?

The Witness: I am Vice President and General Manager of the Mid-States Insurance Company.

(Testimony of Gerald A. Hatfield.)

The Court: How long have you been so engaged?

The Witness: Since October, 1950. [5]

The Court: Prior to that time what was your activity?

The Witness: Prior to that I was Vice President of Mid-States in Charge of Underwriting.

The Court: For what period of time?

The Witness: Since 1946. I don't remember the exact month.

The Court: Prior to that?

The Witness: Prior to that I was employed with Mid-States as an underwriter and manager of their underwriting department, but no title.

The Court: Take the witness.

Direct Examination

Mr. Garrison: Does Your Honor prefer that counsel remain here, or may I be seated, sit at the counsel table?

The Court: I have no rigid rules here.

Mr. Garrison: Thank you. I didn't know whether Your Honor had or not.

Mr. Garrison: Q. Mr. Hatfield, since you have been Vice President of the Mid-States Insurance Company what, generally, have been your duties?

A. Do you mean since I have been General Manager, or just since I have been Vice President?

Q. Since you have been—well, let's start back, when you were General Manager. [6]

A. Well, since I have been General Manager

(Testimony of Gerald A. Hatfield.)

my duties have been to supervise the underwriting, the loss operations, and administrative operations of Mid-States.

Q. That includes supervision of agents of Mid-States, does it? A. Yes, sir.

Q. And when did you first assume those duties?

A. In October of 1950.

Q. And do you know Mr. Joseph Lotz?

A. I do.

Q. When did you first meet him?

A. I first met Mr. Lotz in July of 1950.

Q. Where? A. In Oakland, California.

Q. In that connection of business with Mid-States Insurance Company? A. Yes, sir.

Q. Was Lotz at that time an agent of the Mid-States? A. He was.

Q. Are you familiar with the contract that was originally entered into between the Mid-States Insurance Company and Mr. Lotz?

A. Yes, sir.

Q. You, however, did not negotiate that particular contract? A. No, sir. [7]

Mr. Bronson: Which one?

Mr. Garrison: That is the early 1947, first one.

Mr. Garrison: Q. I will show you a document, Mr. Hatfield, which is entitled "Agency Agreement with Endorsement to Contract By and Between Mid-States Insurance Company and Joe Lotz" dated May 15, 1947, and ask you if that is the

(Testimony of Gerald A. Hatfield.)

agency agreement that you referred to as being familiar with?

A. Yes, sir, this is the original contract.

Mr. Garrison: I would like to have this marked for identification, if I may, Your Honor, until such time as I can lay a proper foundation, unless there isn't any question in your mind.

Mr. Bronson: There will be no question.

Mr. Garrison: Then may it go in as Plaintiff's Exhibit 1 in order?

The Court: It may be admitted and marked next in order.

The Clerk: Plaintiff's Exhibit 1 admitted and filed in evidence.

(Whereupon Agency Agreement referred to and described above was admitted into Evidence and marked Plaintiff's Exhibit No. 1.)

Mr. Garrison: Q. And under that contract how was Mr. Lotz operating in respect to his company's retained commission and the credit period allowed him? [8]

A. That contract is one which is known as a pure retrospective contract. Under the contract Mr. Lotz was obligated to remit to Mid-States Insurance Company one-hundred per cent of every premium dollar which he—for every policy that he wrote. The contract provided that Mid-States was entitled to retain twenty per cent of each premium dollar as it became earned to cover the home office expense and overhead cost, plus profit percentage for Mid-States.

(Testimony of Gerald A. Hatfield.)

The remaining eighty per cent of the premiums, as they became earned, were credited to Mr. Lotz' account. Out of that eighty per cent he was required to pay all losses under the policies, adjustment expense and whatever commission he paid to get the business.

Q. Did Mr. Lotz, as the agent, make his own adjustments for losses?

A. Yes, sir, he did.

Q. And you refer to that as a pure retrospective contract. How do you distinguish between pure retrospective and the other type?

A. Well, there are some types of—in other words, retrospective contracts which, although you get commission earnings, is dependent upon the contingent earnings, as this one is. There is also some cases of prepaid commission allowed to the agent.

Q. In other words, those terms refer to the variations in [9] the arrangements that are made with the different agents? A. That is correct.

Q. And those contracts are, I assume, negotiated with the agents, are they, some agents being able to get a more favorable contract than others?

A. That is true, yes, sir.

Q. And how long did Mr. Lotz operate under that Exhibit 1 entered into in May of 1947?

A. He operated under that contract until September 1, 1951.

Q. Were there any modifications or changes in that contract?

(Testimony of Gerald A. Hatfield.)

A. Yes, there were changes from time to time under it.

Q. Are those changes shown by endorsement of the contract?

A. The contract was endorsed each time a change was made—not on this particular copy.

Q. What changes were made?

A. Well, the first change that was made was a change reducing Mid-States' net retention from twenty per cent to seventeen and one-half per cent.

Q. Well, now, what was the reason for making that change?

A. I had nothing to do with the change, so I can't tell you what the reason was.

Q. That occurred before your stewardship?

A. Yes.

Q. In other words, the effect of that change, I take it, was that the company retained less for its service and the [10] Agent Lotz received more for his?

A. That's right, he was given a two and one-half per cent greater potential earning, that's true.

Q. I see. And then what other change was made?

A. Then another change was made in May of 1951 whereby our retention was—no, I beg your pardon, there was another change prior to that where his retention was reduced to fifteen per cent—our retention, Mid-States's retention.

Q. In other words, he was given, in effect, another—

(Testimony of Gerald A. Hatfield.)

A. Another two and a half per cent added potential, yes, sir.

Q. Increasing his potential earnings?

A. That's right.

Q. That was an improvement to him insofar as his contract was concerned?

A. That's correct.

Q. And did you have anything to do with negotiating that change?

A. No, that was prior to my——

Q. That likewise was prior to your effective day.

Now, I will show you another document which is entitled "Agency Agreement with Mid-States Insurance Company", ask you if you will look at that and tell me if you are familiar with it, and what it is. [11]

Mr. Bronson: Isn't the endorsement, fifteen percent, changed on part of that Exhibit 1?

Mr. Garrison: I will ask him about that.

Mr. Bronson: Well, if it is, that is all that is required.

Mr. Garrison: I didn't actually notice.

The Witness: Yes, sir, this is a contract we entered into with Mr. Lotz on September 1, 1951.

Mr. Garrison: Q. This was a different arrangement from the one that you had with him previously?

A. Yes, it was a different arrangement.

Q. What was the difference?

A. Well, basically, it is still a retrospective contract, but this is one of the modified types I men-

(Testimony of Gerald A. Hatfield.)

tioned a moment ago wherein we allowed him a fifteen per cent prepaid commission in addition to his contingent commission.

Q. What retention did the Company have under that?

A. Under this contract, we retained fourteen per cent.

Q. In other words, you had, in those changes, reduced the amount of your charge for your service and increased his, and in addition to that, into this contract you allowed him to keep in advance fifteen per cent?

A. That's correct.

Q. In anticipation of his ultimately earning fifteen per cent?

A. That's correct. [12]

Q. And does that—are there any endorsements on that agreement?

A. Yes, there are two endorsements on here.

Q. What are those?

A. One is a rider containing a provision allowing him the fifteen per cent advance commission for a certain period of time. Another is a paragraph in the rider stating that he would write not less than \$25,000 per month in order to receive the retention of fourteen per cent. This also enabled him to appoint other agents directly for Mid-States Insurance Company if he so desired.

Q. I see.

A. Then the second rider is simply a formula showing how his contingent commission was to be computed.

Q. I see.

(Testimony of Gerald A. Hatfield.)

Mr. Garrison: Does that answer your question, Mr. Bronson?

Mr. Bronson: I was referring to Exhibit 1.

Mr. Garrison: Oh, Exhibit 1.

Ask that this Agency Agreement be received in evidence as Plaintiff's Exhibit No. 2, being the document September 1, 1951.

The Court: Be admitted and marked next in order.

The Clerk: Plaintiff's Exhibit 2 admitted and filed in evidence. [13]

(Whereupon Agency Agreement dated September 1, 1951, was received in evidence and marked Plaintiff's Exhibit No. 2.)

Mr. Garrison: Q. When had you first started supervising Mr. Lotz' agency operation?

A. In October of 1950—Yes, 1950, that is correct.

Q. And had you had a record of his business transactions for the period since 1947?

A. Yes, we had a record.

Q. Those are kept in the office as a customary part of your accounting procedure?

A. That's correct.

Q. You knew what he had written in the years previously, did you? A. Yes, sir.

Q. What his loss ratio was?

A. Yes, sir.

Q. And what profits he had made out of his operation? A. Yes, sir.

Q. Now, during the time that you supervised

(Testimony of Gerald A. Hatfield.)

that agency, did you do so from—Well, withdraw that.

Where was your office at that time?

A. In Chicago, Illinois.

Q. And how did you carry on your work of supervision of the offices throughout the country?

A. Well, I supervised our outside agents by personal contact, by telephone and by correspondence.

Q. And in what states did your Company write insurance?

A. Well, our Company was licensed in twenty-eight states.

Q. So that you made your trips to the various states periodically and the rest of the time you contacted them by phone and letter?

A. That's right. I tried to call on the agents personally at least twice a year.

Q. We have referred to the retrospective plan here, and I wonder if you could review for us just briefly again how the retrospective plan of underwriting differs from other methods of carrying on the insurance business?

A. Well, the retrospective plan differs basically because the agents' commission is entirely contingent upon the loss experience on the business which he writes. This differs from the usual agent's contract, or the usual agent's plan, in that an agent is guaranteed a certain percentage of commission based upon the written premiums. But under the retrospective there is no guarantee, and also commissions are computed rather than on written pre-

(Testimony of Gerald A. Hatfield.)

miums at the time the policy is written, under the retrospective the commissions are computed as the premium becomes earned.

Q. In other words, the average, normal, or common arrangement where the local agent represents an insurer, he gets his [15] commission when he first writes the business? A. That's correct.

Q. Is that true? A. That's correct.

Q. And under this plan, he doesn't get his commission until the business has matured and there has been demonstrated that there is a commission earned? A. That's correct.

Q. If the loss ratio happens to be high, it is conceivable he wouldn't receive any?

A. That is correct.

Q. And if it is abnormally low, he would receive much more than the average normal local agent?

A. Yes, sir.

Q. I take it the agent under the retrospective plan pays his own overhead and operating costs?

A. He pays all expenses, yes, sir.

Q. What else does he have to pay?

A. He pays whatever advance commissions he pays to brokers to secure the business.

Q. In other words, he must pay the sub-agent funds to begin with—

A. If he makes that arrangement with the sub-agent, yes.

Q. Now, do you know what the volume of insurance was that Mr. Lotz wrote the first years of this connection with the [16] Mid-States?

(Testimony of Gerald A. Hatfield.)

A. Well, he began in May of 1947, and his volume during that time was very low.

Mr. Bronson: Wait a minute. I am going to object. He hasn't answered the question. He was asked if he knows, it is a foundational question.

Mr. Garrison: Q. Do you know?

Mr. Bronson: I might want to inquire what his knowledge is based upon.

The Court: You may answer yes or no.

Mr. Garrison: Q. Do you know what his volume was with the Company in the first years that he was appointed? A. Approximately, yes.

Q. Will you tell us what volume of business Mr. Lotz developed as an agent of Mid-States beginning in May of 1947?

Mr. Bronson: Wait a minute. I will object to that; it may be hearsay, it may be a conclusion, might be anything. I would like to have some foundation.

The Court: Do you know that of your own knowledge?

The Witness: I don't know definitely, no, sir. I have records I could refer to.

The Court: Are they records here and available?

The Witness: The records aren't here today.

Mr. Garrison: Q. Well, let me ask you, were those records a part of the books and records of account of the [17] Mid-States Insurance Company? A. Yes, sir.

Q. Did you have those in your charge and custody while you were there as supervising manager?

(Testimony of Gerald A. Hatfield.)

A. Yes, sir.

The Court: Was that in 1947?

The Witness: I beg your pardon, weren't in my charge in 1947, no.

Mr. Garrison: Q. Now, when you came there?

A. That is right.

Q. They were part of the permanent records of the Company, were they?

Mr. Bronson: Mr. Garrison, with your method of examination, it makes it very difficult, the witness has done very little testifying, and I think they have been very leading questions.

The Court: He suggests these are leading questions, Counsel.

Mr. Garrison: Well, I am trying to lay a foundation.

Mr. Garrison: Q. Just tell us then, where you, what information you base your statement that you know generally what his writings were from the first policy he wrote for the Company—where did you get that information?

The Witness: From our accounting department.

Mr. Garrison: Q. And where are they located?

A. In Chicago.

Q. And where would they get the information?

A. They would get the information from the business as it was submitted by Joe off the daily reports.

Q. Mr. Lotz, you mean?

A. Mr. Lotz, excuse me.

(Testimony of Gerald A. Hatfield.)

Q. And were those records kept in the office as part of their records?

A. In our office?

Q. Yes. A. Yes, sir.

Q. And did you have an access to those as part of your duties in supervising the agencies?

A. Yes, sir.

Mr. Garrison: It seems to me, Your Honor, that those are part of the Company's official records which he used in supervising the agencies, be part of his duties to refer to them and be familiar with them.

The Court: Nothing before the Court.

Mr. Garrison: I beg your pardon?

The Court: There is nothing before the Court.

Mr. Garrison: Thank you.

Mr. Garrison: Q. Tell us, Mr. Hatfield, what premium volume did Mr. Lotz develop from the year 1947 on up to 1950? [19]

Mr. Bronson: I am going to object, no foundation laid, calls for hearsay. These are records that we have never seen, or that were submitted to us, Your Honor. We have had certain records submitted to us, it is quite true, and having had a chance to examine those we make no objection.

The Court: He is entitled to those records.

Mr. Garrison: I beg your pardon?

The Court: He is entitled to the record, which is the best evidence.

Mr. Garrison: Very well, I think the record would be the best evidence.

(Testimony of Gerald A. Hatfield.)

Mr. Garrison: Q. Now, then, Mr. Hatfield, after you went with Mid-States Insurance Company and began the function of assuming the supervision of the agencies, and Mr. Lotz, were you personally acquainted with the volume of business that Mr. Lotz developed for the company? A. Yes, sir.

Q. And what did you say was the date that you first started supervising Mr. Lotz' writings?

A. In October, 1950.

Q. And what was the premium volume developed by Mr. Lotz in 1950?

A. His average monthly premium volume was approximately fourteen or fifteen thousand a month.

Q. What was the condition of Mr. Lotz' account with Mid-States [20] Insurance Company during 1950 with respect to being current?

A. It was current.

Q. And how were his payments made in respect to the due dates as they came due?

A. Well, his payments were made sometimes late, but never late enough to become alarmed.

Q. In other words, the accounts were paid when they became due, although sometimes tardy?

A. That's right.

Q. And did it require occasional follow-up letters?

Mr. Bronson: Same objection, it is leading the witness, if Your Honor please.

Mr. Garrison: Withdraw the question.

Mr. Garrison: Q. Did you have occasion to cor-

(Testimony of Gerald A. Hatfield.)

respond with him regarding the payment of his account?

A. I didn't personally, but my accounting department or underwriting manager did.

Q. And that had to do with the due date and the date of payment? A. That's right.

Q. When did you first learn that Mr. Lotz had entered into any kind of a transaction with the Public Service Insurance Company in connection with the Mid-States business?

A. The latter part of November, 1951.

Q. The latter part of November in 1951. And did you [21] investigate that transaction after you had first knowledge of it?

A. I beg your pardon, sir, that was incorrect. Will you restate your question again?

The Court: Read the question, Mr. Reporter.

(Question read by the reporter.)

A. That answer should be the latter part of September, 1951.

Mr. Garrison: Q. Latter part of September, 1951. And did you thereafter investigate and inquire regarding that transaction? A. I did.

Q. And did you find—what did you find with respect to whether or not the business had already been written in the Mid-States Company before you had notice of it?

A. I found the policies had been written and issued.

Q. By Mr. Lotz?

A. By Mr. Lotz' office, yes, sir.

(Testimony of Gerald A. Hatfield.)

Q. Now, in your supervision of these agencies, including Mr. Lotz', do you have under these contracts any control over the business that they underwrite?

A. We have underwriting control, yes.

Q. What do you mean by that?

A. I mean we supervise the agent, what type of business he should write under the contract in order to make money under it.

Q. Is that provided for in this agency agreement? [22]

A. I couldn't state whether—

The Court: Here it is (indicating).

Mr. Garrison: May I see that, Your Honor?

Mr. Garrison: Q. I wonder if you would look at the agency agreement referred to as Plaintiff's Exhibit 2, tell me whether or not there are any provisions in there relating to underwriting control by Mid-States?

A. No, I don't see anything in here giving us specific underwriting control.

Q. Do you provide, is that in your discussions with the agent?

Mr. Bronson: That is a leading question, if Your Honor please. The witness can hardly squirm out of the answer suggested, and I again object.

The Court Objection sustained.

Mr. Garrison: Q. Did you actually, as a matter of fact, exercise underwriting control with Mr. Lotz? A. Yes, we do with all agents.

(Testimony of Gerald A. Hatfield.)

Q. And what does that mean, "underwriting control"?

A. That means we check the type of risk he is writing to see what kind of business he is submitting to us.

Q. We referred this morning to sub-standard business. Would you tell the Court what you mean by sub-standard business?

A. Well, sub-standard insurance risk is dependent upon several factors. One factor is the age of the driver; another factor could be the nationality extraction of the driver; [23] another factor is the occupation of the insured; still another factor might be who the mortgagee is named in the policy; other factors are relating to the type of coverage written for a certain type of automobile. Other factors are rates that are used.

Q. In other words, the presence or absence of some or all of those conditions determine the class of business that is involved?

A. That is correct.

Mr. Bronson: That is a recapitulation and interpolation and a suggested answer, and we object on those scores.

The Court: Read the question and the answer.

(Record read by the reporter.)

The Court: I will allow the question and answer to stand; the objection will be overruled.

Mr. Garrison: Q. And does the fact of business being sub-standard necessarily control whether it can be underwritten profitably or not?

(Testimony of Gerald A. Hatfield.)

A. That's correct.

Q. And how are rates, if at all, adjusted to meet the conditions of the assured?

A. Well, the agent has no power to adjust rates.

Q. No, I don't mean the agent, I mean the insured.

A. The insurance company?

Q. Yes. [24]

A. The insurance company sets its rate schedules up on the basis of past experience for any given coverage.

Q. And you had a different scale for different kinds of business, whether it is standard or sub-standard?

A. In some cases that is entirely possible; in other cases we don't.

Q. And did Mr. Lotz have a scale for sub-standard business?

A. At one time he had a scale for sub-standard business.

Q. Does your company accept sub-standard business ordinarily?

A. Ordinarily we will accept it in a limited capacity.

Q. What do you mean by that?

A. I mean by that we will not permit an agent to write nothing but sub-standard business with us. In fact, we insist upon a preponderance of standard risks before we accept sub-standard.

Q. But you do expect a certain percentage of sub-standard business and those figures enter into your job in the supervision of the underwriting?

(Testimony of Gerald A. Hatfield.)

A. That's right.

Q. And how do you do that in relation to a given agent's business?

A. Check the daily reports that he has been sending in into the home office.

Q. Those daily reports are what?

A. A daily report is a copy of the policy which he has issued in each case. [25]

Q. When do you receive that in relation to when——

A. Supposed to receive it on a daily basis. In other words, the agent is supposed to mail them the same day he issues the policy.

Q. Your function is to review those?

A. It isn't my function any more.

Q. But I mean at the time we are discussing?

A. That's right.

Q. Now, you say in the latter part of September you received these Public Service dailies?

A. That is correct.

Q. 1951? A. Yes, sir.

Q. And in what numbers did you receive them?

A. As I recall the first group that came in were between six and seven hundred.

Q. Six and seven hundred?

A. Daily reports, that's right.

Q. Did they show when they had been written up? A. Yes, sir.

Q. When had they been written up?

A. In the early part of September, 1951.

(Testimony of Gerald A. Hatfield.)

Q. And on the same day? All of them on the same day?

A. No, the writing dates varied. I think they were all written within a period of a week or ten days. [26]

Q. But they arrived in your office in one bunch?

A. That is correct.

The Court: Did I understand 700?

The Witness: Six or seven hundred, somewhere between there.

Mr. Garrison: Q. And what did you do?

A. Well, as soon as I saw them I became rather excited about it, because it was the first time we had ever received such a volume of business in one group from this agent. So that night I took these six to seven hundred daily reports home with me and personally scanned through them to see what kind of business it was.

Q. What did you find?

A. Well, I found that there were so many violations of our underwriting policy and rates, our general policy of operations, that I thought it necessary to get hold of Mr. Lotz at once.

Q. What did you do?

A. The next morning I tried to locate him by telephone, but I was unable to locate him.

Q. Then what did you do?

A. Then I sat down and wrote him an airmail letter.

Q. And did you review in the letter the discov-

(Testimony of Gerald A. Hatfield.)

eries you had made the night before in the analysis of the dailies? A. I did.

Q. Then after that letter what occurred in connection with [27] this subject?

A. Well, after that letter the telephone company finally located Mr. Lotz about a week later in Santa Barbara, California, at which time then I discussed the whole matter with him.

Q. What was that conversation?

A. Well, that conversation——

The Court: Lay the foundation for it. Has the foundation been laid?

Mr. Garrison: Q. In Santa Barbara, and do you know the date?

A. I think it was October 5.

Q. October 5, and it was between you and Mr. Lotz? A. That's correct.

Q. Would you tell us the conversation?

A. Yes, in that conversation—I am more or less repeating what I had said in my letter of September 28—but I asked some additional facts as to why he would take the business and what he thought about it.

He told me that he had taken the business because he had previously had a similar group of business on which he had made money. I asked him if he had been paid the premiums for the business, and he said yes. I asked him if he had received all of it, to which he replied yes.

Then I told him that I thought that it was very bad [28] judgment on his part for accepting such

(Testimony of Gerald A. Hatfield.)

business, and that he would have to make numerous changes in the policy if we were to allow them to continue in force.

Q. Then did you have any subsequent conversation with him, or correspondence?

A. Well, he immediately replied to me by air-mail letter, I think on—no, again I wrote to him, I beg your pardon, again wrote to him on October 8 setting forth additional facts that—and duties that he would have to perform to change the policies so as they would conform to our underwriting standards and also they would conform to the rates we were using in the state at that time.

I pointed out in that letter, too, I believe, that there were certain risks that I insisted he cancel immediately, and I also asked him in that letter as to what commission he had paid for the business.

Q. Your first letter you said was September 28?

A. I believe that's correct.

Q. And the second was October 8, is that correct?

A. That's right.

Mr. Garrison: You have copies of that, I believe, Mr. Bronson.

(Colloquy between counsel inaudible to the reporter.)

Mr. Garrison: Q. I show you a copy of a letter dated September 28, and ask you if that is the letter that you [29] referred to that you wrote Mr. Lotz?

A. Yes, sir, this is it.

Mr. Garrison: I ask that this be received in evidence as Plaintiff's Exhibit 3.

(Testimony of Gerald A. Hatfield.)

The Court: Be admitted and marked next in order.

The Clerk: Plaintiff's Exhibit 3 admitted and filed in evidence.

(Whereupon document, letter dated September 28 to Mr. Lotz was received in evidence and marked Plaintiff's Exhibit 3.)

Mr. Garrison: Q. I will show you a letter dated—a copy of a letter dated October 8 and ask you if you will tell us what that is.

A. This is a copy of the letter I wrote Mr. Lotz on October 8.

Mr. Garrison: I ask that this be received as Plaintiff's Exhibit 4.

The Court: That may be marked in evidence.

The Clerk: Plaintiff's Exhibit 4 admitted and filed in evidence.

(Whereupon document, letter dated October 8 Mr. Lotz was received in evidence and marked Plaintiff's Exhibit 4.)

The Court: I think it might be well to have them read in evidence. [30]

Mr. Garrison: I didn't hear your Honor.

The Court: I think it would be well to read them into the record so I will know what they are at this time.

Mr. Garrison: Thank you. The September 28 letter is as follows:

(Testimony of Gerald A. Hatfield.)

“September 28, 1951, Air Mail, Mr. Joe Lotz, 315 Fourteenth Street, Oakland, California.

“Re: Public Service Company Rewrites.

“Dear Joe:

“It certainly looks to me like someone has been ‘pulling your leg’ in getting you to accept the business which the Public Service Company canceled. I do not believe you were close enough to the picture to realize what has happened and after reviewing the group of daily reports which we have just received, I am going to try and point out below that which seems like glaring evidence that someone is taking advantage of you.

“In the first place, Joe, these rewritten policies in Mid-States have not been written under our current rate schedule. We have computed the pro-rata premium which would apply in several of the daily reports and none of them agree with our figures. Also, it is very obvious that our present rate chart was not followed because many of these policies are written for \$15 [31] deductible fire and theft. Our present rate chart makes no provision for this coverage whatsoever. So how can anyone tell you that these policies were written under our existing rate chart. Joe, I am sure you can realize that this is something that must be corrected at once. I cannot afford to let these run through and run the risk of being criticized or condemned by the California Insurance Department. So I trust you will take immediate steps to endorse these policies to the

(Testimony of Gerald A. Hatfield.)

proper rates and coverages which are permissible under our rate chart.

“Secondly, at least 60 per cent of this business covers sub-standard risks from the standpoint of either age, race, or occupation. To me, this makes it very obvious what public service was trying to do which was purely and simply get rid of some of the business which causes them their losses. If this was not the reason then how on earth could there be such a high ratio of sub-standard risks to standard risks. It is my belief that if you continue on these risks they will not make any money for you, but, on the other hand, I would be willing to bet you a new suit that you would end up in the hole on this group of business. Joe, I think you should give this very serious thought and it may be that such thought will change your mind about keeping this [32] business at all. You know as well as I do that volume alone does not make you money—but volume coupled with high quality business will make you a lot of money.

“Another thing that substantiates my belief that you are being given the cats and dogs is that I have noticed several risks where the mortgagee is Commercial Credit Corporation, Pacific Finance Company and the Bank of America. Joe, each one of these finance companies have insurance carriers of their own and if the business was desirable you couldn't pry it away from their own insurance carriers. I have had enough experience with this to know what I am talking about because our own

(Testimony of Gerald A. Hatfield.)

parent company, G.F.C., follows the same practice in their efforts to protect and maintain a low loss ratio with us.

"If I seem to be a little disturbed by my remarks above it is only because I consider you a very good friend and I am trying to protect your interests. Any remarks above while they may be worded rather strongly are meant only as constructive criticism and there is absolutely no intent to ridicule you. Please let me have your reaction to the above and your comments as quickly as possible. Best regards.

"Yours very truly, Gerald A. Hatfield, Vice-President."

The letter, October 8, 1951, Air Mail: [33]

"Mr. Joe Lotz, 315 Fourteenth Street, Oakland, California:

"Dear Joe:

"I certainly appreciated your calling me Friday and telling me that you issued orders to your office that all policies issued in the rewriting of Public Service business must be changed to the present Mid-States rates. It is my understanding that your office will begin making these changes immediately on all such policies with the possible exception of policies which have already expired or are due to expire within the next few days. I would like to suggest that you take one further step while making these changes and that is that the collision

(Testimony of Gerald A. Hatfield.)

coverage on all substandard risks should be changed to \$100 deductible. I honestly believe that this change is just as necessary as securing the proper rates in order that both you and Mid-States can make money on this group of business. Also remember that every policy which is now written for deductible, comprehensive or fire and theft must be eliminated because our present rate chart does not provide for this coverage on a deductible basis.

"I am also requesting that you cancel immediately all policies in this group which show a loss payable clause to Commercial Credit, Pacific Finance and Universal CIT. All policies which have loss payable [34] clauses to these firms are strictly low substandard risks otherwise they would have been written in these companies' own insurance carriers. I do not want Mid-States to gain a reputation of writing this kind of business when their own carriers will not write it. I do not believe that you will find that by complying with this request that you will have a great number of cancellations to effect. The number of such policies is relatively small, but, regardless of that fact, we should not write a single policy for these companies.

"I note that on many policies you have attached special endorsements such as a named insured endorsement and a California restriction endorsement. I would like to know what class of risk carry these endorsements and I want you to be absolutely sure that every single policy issued on that class carries

(Testimony of Gerald A. Hatfield.)

the same endorsement. If you do not make certain of this then we will be guilty of discrimination again in the eyes of the insurance department and we cannot stand another chance of this kind. I would much prefer to eliminate all such endorsements entirely rather than run the risk of being guilty of discrimination. I understand that Kledzik and Oldberg are coming to Oakland tomorrow night. I am glad to hear this because they can give you a great deal of assistance in cleaning up this situation. [35]

"I am wondering, Joe, what kind of commission you paid to get this group of business. Truthfully, I don't see why you would have to pay any commission because it appears to me that you have helped the Public Service Company out of quite a mess. If you did have to pay a commission I think you should set it up strictly on a contingent basis with any payment being held off until the business has completely run off.

"I hope you will pardon my being so blunt but I still feel that somebody sold your office a "bill of goods". I hope you will instruct Smead that before he ever again agrees to a deal of this kind that he will not only have your personal okay but that you will contact me before giving your approval so that we can discuss all angles of the deal before going into it. I certainly wish I could be out there to assist you too but I know you will

(Testimony of Gerald A. Hatfield.)

straighten the situation out as fast as possible. Best personal regards.

“Yours very truly, Gerald A. Hatfield, Vice-President.”

Mr. Garrison: Q. Now when you wrote that letter—those letters, had you received all of the Public Service dailies? A. No, some.

Q. Some came in after?

A. Some came in after that, yes, sir. [36]

Q. Had you any knowledge at that time that Lotz was in any kind of financial difficulties?

A. No, sir.

Q. In reference to retaining some of the Public Service business in those letters, was it your expectation that you would ultimately be paid premiums on that business? A. Yes, sir.

Q. Were you ever paid the premiums on it?

A. No, sir.

Q. Do you know how many policies were involved altogether in that Public Service so-called re-write?

A. In the neighborhood of 1,800 to 2,000.

Q. You received the balance of the dailies after this first bunch of six or 800? A. Yes, sir.

Q. Did you have a visit from Mr. Lotz sometime during the month of August in 1951 in Chicago?

A. Yes, sir, he came to Chicago on August 15, 1951.

Q. That was before this occurrence?

(Testimony of Gerald A. Hatfield.)

A. Yes, sir.

Q. We were just talking about?

A. Yes, sir.

Q. Did you have a conversation with him there?

A. Yes, sir.

Q. Where? [37]

A. In my office and also in Mr. Titus' office.

Q. Who else was present?

A. Mr. Titus and myself.

Q. Mr. Titus, who is he in relation to Mid-States?

A. In relation to Mid-States, he is president of Mid-States.

Q. He is the gentleman in the courtroom?

A. Yes, sir.

Q. And what was said by you and what was said by Mr. Lotz in relation to his relationship to you and the American Fidelity and Casualty Company?

A. Well, Mr. Lotz came in and wanted to know if we would be interested in entering into a new contract with him. He said that he was fed up with the way he was being treated by American Fidelity and the American Plan Corporation, and that if we would give him a contract anywhere along the lines he wanted he would be glad to come back to Mid-States.

Q. By the way, had he changed the volume of business that he had been writing with you prior to that?

A. Prior to August 15, you mean, sir?

(Testimony of Gerald A. Hatfield.)

Q. Prior, yes.

A. Yes, his volume of business with us prior to August 15 had dropped to zero in one or two months and very low in other months.

Q. When did that start? [38]

A. That started really in January or February of 1951.

Q. You know of your own knowledge that he made a contract with the American Fidelity and Casualty Company and American Plan at about that time? A. Yes, sir.

Q. And do you know when that was he made that arrangement?

A. No, I don't know the exact date. I think it was in January.

Q. Your business with Mr. Lotz was changed as of about January?

A. You mean our business from the standpoint of volume?

Q. Yes. A. Yes.

Q. And what was the change in January of '51 on down to this date in August?

A. Well, our volume from January, 1951, dropped sharply until August of 1951.

Q. So that you practically were doing no business with him at this time in August at all?

A. That's right.

Q. And then you had this conversation, and go ahead with it and finish it.

A. Well, he said he wanted to come back to Mid-States and be one hundred per cent representa-

(Testimony of Gerald A. Hatfield.)

tive of ours and he asked for a contract, a new contract wherein we would give him [39] a 15 per cent advance or prepaid commission.

Well, during the conversation we agreed upon other points as to the term of credit. We told him we would give him sixty days term of credit, and also told him we would give him the power to appoint other agents direct for Mid-States as he saw—wanted it. Also agreed upon the minimum premium volume he was to receive if we were to give him a retention of 14 per cent, which he had asked for, and as a result of all these points we discussed amongst the three of us, we agreed upon the contract which was finally drawn on September 1.

Q. That is the one you have in your hand?

A. Yes, sir.

Q. Plaintiff's Exhibit 2. And that was a more favorable contract as far as Mr. Lotz was concerned than any you previously had had?

A. That's correct.

Q. Did he say anything at that time about his reasons for discontinuing with the American Plan or American Fidelity?

A. Yes, he said he was tired of the kind of treatment they were giving him, made many promises that they hadn't lived up to.

Q. He didn't say anything about American Plan or American Fidelity cancelling themselves this contract? A. No, he did not.

Q. Did he tell you anything about his financial condition? [40] A. No, sir.

(Testimony of Gerald A. Hatfield.)

Q. Did he say anything in that meeting in August about the prospect of this Public Service deal?

A. No, sir.

Q. Did he tell you that he had previous, just immediately prior to that time been in New York with the American Plan and American Fidelity officials?

A. No, sir.

Q. Did he mention having seen Mr. Hart just the day before?

A. No, sir.

Q. How had you arranged your appointment with Mr. Lotz on that occasion?

A. Well, it was arranged by telephone from Mr. Lotz.

Q. Did you talk to him?

A. No, my secretary did.

Q. Does that substantially complete the conversation of August 15, 1951, with Mr. Lotz?

A. That is about all I can remember pertinent to the contract. Of course, we had a lot of conversation.

Q. I know, I mean the pertinent portion.

A. Yes.

Q. And subsequently this contract was completed and sent to him, was it?

A. That's correct.

Q. Now, when did you first hear from anyone, or when did [41] you first have your conversation with anyone regarding the Public Service rewrites, so-called?

A. Well, the first conversation I had with anyone would be the telephone call from Mr. Lotz,

(Testimony of Gerald A. Hatfield.)

or where I was trying to locate Mr. Lotz, finally located him in Santa Barbara on October 5.

Q. That's the one you have already described?

A. Yes.

Q. After you had that conversation and you dispatched these letters, what did you do in connection with Mr. Lotz' affairs?

A. I don't hardly know what you are driving at.

Q. Well, did you get some further information from someone regarding Mr. Lotz' affairs shortly after you wrote these letters?

A. We had received notice from the Insurance Department of the State of California that they were suspending Mr. Lotz' license.

Q. Not in connection with the Public Service transaction? A. No.

Q. Had you gotten reports from anyone else about Mr. Lotz' affairs, and about this time? If you don't recall, I believe you did go to Oakland shortly after this October——

Mr. Bronson: I don't hear your question.

The Court: He is reframing the question. [42]

Mr. Bronson: I didn't hear the question.

Mr. Garrison: Q. My question has to do now with whether or not you made a trip from Chicago to Oakland in connection with Mr. Lotz' affairs?

A. Yes, I went from Chicago to Oakland on November 23rd.

Q. And does that refresh your recollection regarding having had reports from anyone prior to your going to Oakland? A. Yes, it does.

(Testimony of Gerald A. Hatfield.)

Q. I don't want you to tell us what the reports were, but did you get reports from someone?

A. That's correct.

Q. Who were they?

A. From Mr. Oldberg.

Q. Who is he?

A. Mr. Oldberg was our resident vice-president, located in Los Angeles.

Q. You had a conversation with him about Mr. Lotz?

A. That's correct.

Q. Had he been to Oakland himself before calling you?

A. Yes, sir.

Q. All right. Now, then, you went to Oakland then immediately?

A. He called us—he called me on the, I think, about the 20th of November.

Q. When did you go to Oakland? [43]

A. I went to Oakland on November 23.

Q. Who did you see there?

A. Well, I saw Mr. Oldberg and Mr. Kledzik, and I saw Mr. Lotz and Mr. Smead, Mr. Lotz' attorney at that time, Mr. Mead.

Q. Mr. William Mead of Oakland?

A. That is correct.

Q. Did anyone accompany you to Oakland from Chicago?

A. Yes, our staff counsel accompanied me, Mr. Frank Czar.

Q. Is that C-z-a-r?

A. Correct.

The Court: Take a recess.

(Short recess.)

(Testimony of Gerald A. Hatfield.)

Mr. Garrison: Q. Mr. Hatfield, I was just about to ask you a question regarding your trip out to Oakland from Chicago before we recessed. Before we get out to Oakland, I would like to ask you one or two other questions. What was the condition of Mr. Lotz' account with Mid-States during this period that you have been referring to, September and October? A. It was current.

Q. When you wrote those letters to him?

A. Yes, sir.

Q. Now, during that period did you have a conversation on the telephone with Mr. Hart, the president of the American Plan Corporation? [44]

A. I had a conversation with Mr. Hart on either October 31 or November 1, I don't know which.

Q. Was that before or after you went out to Oakland? A. That was before.

Q. And how did that call come about, what date was it and what was said?

A. Well, it will have to go back to about October 30, Ralph Smead of Mr. Lotz' office called me from Oakland and asked me if I would entertain the proposition of rewriting a group of business which he had already written with the American Fidelity.

Q. Which he, Lotz' office, had written with the American Fidelity? A. That's correct.

Q. Now, this subject is disassociated from the Public Service transaction, is it?

A. Entirely separate and apart from it, yes.

Q. This is another transaction entirely?

(Testimony of Gerald A. Hatfield.)

A. Yes.

Q. All right.

A. In the conversation he stated that he would like for me to rewrite a certain group of business, I think he told me at that time approximately \$60,000 worth of policies that he had issued in the month of August and September of [45] 1951. He stated that they were so upset with American Fidelity, the way they had been treated, he wanted to take the business out of them and give it to us. I wasn't too——

Q. No, just what was said. You can't give your emotional reactions.

A. Well, I think then he gave me some of the facts involved. I don't recall the exact conversation except that I did ring off by telling him I would take it under consideration, I made no commitment whatsoever.

Q. That was the conversation with Mr. Smead?

A. Yes, I believe he did ask me in his conversation that if I agreed to take it over that I should please contact Mr. Mark Hart of the American Plan Corporation and advise him accordingly, that he had already talked to Mr. Hart and secured Mr. Hart's approval to effect the rewrite if we agreed to it.

Q. That was the end of that conversation with Mr. Smead? A. Yes, sir.

Q. Then did you have a conversation that I have asked about with Mr. Hart?

A. Well, before having the conversation with

(Testimony of Gerald A. Hatfield.)

Mr. Hart there were one or two telegrams between Mr. Smead and myself. I wired him on one occasion asking for additional particulars, and also told him that in one telegram that if I would agree to take it on that we would not allow the fifteen per cent [46] prepaid commission on that group of business, and I think I received a reply from him concerning it. Then following those telegrams was when I received a call from Mr. Hart in New York.

Q. And that was—you gave us the date, give it to us again?

A. It was either October 31 or November 1.

Q. What was said by you and what was said by Mr. Hart?

A. Well, Mr. Hart called me and told me that he understood that I had been talking to Ralph about rewriting a group of business that had been issued in American Fidelity, and I told him yes. He told me that he thought it would be a favorable deal for us, and I was rather dubious about it until he made the statement that, of course, we would not take over any losses, then he would see to it that no policies rewritten with us on which there had been reported losses, and that, of course, interested me much more.

Mr. Hart stated in his conversation that if we would agree to take over the business it would be rewrite and not a reinsurance deal, and that I would have to look for Joe Lotz for payment of the premiums. I asked him if Joe Lotz was broke, or if

(Testimony of Gerald A. Hatfield.)

he knew Joe Lotz was broke, and I think he replied in the negative.

Mr. Bronson: I am going to ask that go out. I don't think the Court would be interested in the gentleman's thoughts, [47] the part that he said "I think he replied in the negative."

Mr. Garrison: Q. That is your best recollection?

The Court: Pardon me just a moment.

Mr. Bronson: There was an objection.

The Court: The answer was "In the negative." Give the conversation.

Mr. Garrison: Yes, give us your best recollection of the conversation. If you don't know, say, "I don't recall." You don't have to give the exact words, you can give the substance.

A. Much was made of the fact that the reason why American Plan was permitting Mr. Lotz to rewrite this business was because of our advance commission contract with him, and it was stated that they could not meet the contract and if Joe could make a deal with us on that basis they were willing to relinquish their rights on the business.

I asked Mr. Hart in the conversation if they had kicked Mr. Lotz out as an agent, and they said no, definitely not. That, I think, is about the sum total of the conversation.

Mr. Garrison: I believe, if the Court please, that that conversation was recorded by some recording device at the receiving, at Mr. Hart's end of the line and counsel has, under our notice to

(Testimony of Gerald A. Hatfield.)

produce, furnished us with a transcript of that conversation, and I would like to ask counsel to produce it now. [48]

Mr. Bronson: You have a copy, haven't you? You want the record, you mean?

Mr. Garrison: No, just the transcript.

Mr. Bronson: We gave you a copy.

Mr. Garrison: I don't seem to have a copy now.

(Colloquy between counsel inaudible to the reporter.)

Mr. Garrison: While we have the conversation recorded, in keeping with these proceedings, we might as well have it read.

The Court: You have overcome the difficulties by stipulation?

Mr. Garrison: There is no——

Mr. Bronson: Counsel brought the subject up, so we would be entitled to bring it in. Your Honor, I have briefed this thing, and there is no question about any legality of taking down a conversation of this kind.

Mr. Garrison: We are not raising any point of illegal monitoring, if the Court please.

Mr. Bronson: You would do it unsuccessfully. I could say to Your Honor we tried to run this process with the machine and then we found out that the Audograph people have their own equipment for slowing down, and then some girl, professionally and legally, takes those things, and this will be her transcript. We had the thing prepared

(Testimony of Gerald A. Hatfield.)

that way, and the record itself, the disc, is in our possession. [49]

Mr. Garrison: If Your Honor will permit me I would like to read this conversation into the record.

The Court: No objection?

Mr. Bronson: I would like to have it admitted as an exhibit before you do it, because——

Mr. Garrison: I will do it—I will introduce it afterward, and I will ask Mr. Hatfield if this is the conversation just referred to. This is described on the transcript here as a telephone conversation, Mark Hart and Gerald Hatfield, October 31, 1951.

“Telephone conversation

Mark Hart and Gerald Hatfield

October 31, 1951

Hatfield: Hello.

Hart: Jerry?

Hatfield: Yes.

Hart: Mark Hart.

Hatfield: Hello, Mark.

Hart: How the hell are you?

Hatfield: Just fine.

Hart: Long time—I understand you called me a long time ago—I was out of town, or something.

Hatfield: Yeah.

Hart: Jerry, you're going to be at the conference, aren't you? [50]

Hatfield: Yes, sure.

Hart: Yeah, well, I'll see you there. Let me ask you this—I understand from Ralph Smead of Joe

(Testimony of Gerald A. Hatfield.)

Lotz' office that he had some conversation with you about a rewrite?

Hatfield: Yeah.

Hart: Now, frankly—undoubtedly what they're thinking about is this. With us, you know, they have no prepaid commission.

Hatfield: Uh, huh.

Hart: And they tell us that their deal with Mid-States gives them a fifteen per cent prepaid commission, so it's somewhat to his advantage to be able to rewrite this stuff. He's asking me if he could write it flat—he can't cancel flat.

Hatfield: Yes.

Hart: And I've said 'yes' and particularly so—and very frankly, Jerry, that he hasn't paid us for the premiums.

Hatfield: (Laughter)

Hart: He's told you that, I believe.

Hatfield: Yes. How old is it?

Hart: September.

Hatfield: September.

Hart: September, and there's some August. But [51] you see, the September business is not due under our contract—we have seventy-five days.

Hatfield: Sure.

Hart: Actually, until December 15.

Hatfield: Yeah.

Hart: But he's been after me—that you know, after all this fifteen per cent is a big deal for him.

Hatfield: Well, now let me tell you my side of the story.

Hart: Yeah.

(Testimony of Gerald A. Hatfield.)

Hatfield: He did talk to me about it yesterday and I said, 'Well, go ahead and talk to Mark Hart and see what you can find out, if he'll let you do it'.

Hart: Right.

Hatfield: And he said 'all right'. Then I got a wire from him this morning asking me to wire you that I was agreeable to it.

Hart: Right.

Hatfield: Well, in the wire—I certainly woke up when he said 'flat cancellation' and caught the idea that I was supposed to assume the liability back to the effective date, and I wired him asking him if that was his understanding, and [52] if so when was the effective date of the earliest policy involved.

Hart: Oh, wait a minute, Jerry. I can see your point, but let me point this out to you and you can confirm this by talking with Smead. I talked to him today, and I said in cancelling these items, we will not cancel and rewrite anything where we have had a loss.

Hatfield: I see.

Hart: Because in that way then we would have to look to you for the losses, and I don't think that would be fair from the standpoint of your company.

Hatfield: No.

Hart: So the decision is—now the only thing we may have—we may have a loss, or maybe a couple of losses in between the time we cancel and the time it's rewritten.

Hatfield: I understand that, sure.

(Testimony of Gerald A. Hatfield.)

Hart: But beyond that, I will assure you—and incidentally, any of those losses will be ours—but I can assure you that we will not rewrite with you anything where we have a known loss.

Hatfield: Well, that's fine—I didn't know that.

Hart: Oh, sure, I don't want to stick you, Jerry.

Hatfield: Yeah. Well, then I also told him in my telegram to him that if that was the case, I was not going to allow any fifteen per cent advance commission on it.

Hart: Oh, I see.

Hatfield: So now I'll have to just wait and see what he comes back with.

Hart: I see.

Hatfield: So at that we ought to get it cleared out tomorrow.

Hart: You think we can get it tomorrow? All right. If I get your authorization to proceed—In other words, you understand, Jerry, that if we cancel and he rewrites in your company, that you don't look to us for the premiums but you've got to look to him.

Hatfield: Oh, yeah, I understand that.

Hart: Would you be good enough to so state that in your telegram when you wire me?

Hatfield: Yeah.

Hart: In other words, I didn't want to proceed unless I get your okay because you and I have always worked close together.

Hatfield: That's right. [54]

Hart: And, incidentally, the fact that we got in

(Testimony of Gerald A. Hatfield.)

that account and that he gave us so much was—you know—you know how that happened.

Hatfield: Sure, I know that.

Hart: As a matter of fact, when I was out there in Oakland the first time, he told me he was continuing his account with Mid-States because they had some money of theirs—you know—tied up.

Hatfield: Yeah.

Hart: And I said, 'God bless you, go ahead'.

Hatfield: Yeah.

Hart: And I told you that before because we weren't trying to get the whole thing. But he's got a better deal with you. I can't give him that deal. He came to New York and told me what you offered him.

Hatfield: Yeah.

Hart: And I'll be very frank with you, Jerry, and tell you we're the only company in the business that doesn't have a prepaid commission up to this point.

Hatfield: Yeah.

Hart: We may have to do it, but up to this point we haven't done it.

Hatfield: You haven't done it yet. [55]

Hart: So if you'll send me—when you hear from him—what time did you send him that telegram?

Hatfield: At noon, my time.

Hart: Noon, your time?

Hatfield: Yeah. That would be, I think, ten o'clock his time.

Hart: Ten o'clock his time. Well, I talked to

(Testimony of Gerald A. Hatfield.)

him a little while ago. He apparently hadn't gotten it.

Hatfield: He hadn't gotten it yet, huh?

Hart: Well, in view of the fact that—in view of the fact that we haven't—I mean, we're agreed on this no loss thing, you might change your mind about that, er——

Hatfield: Yeah, I might.

Hart: I don't care—it's none of my business, you understand.

Hatfield: No, I understand. But let me ask you this, Mark.

Hart: Yes, Jerry.

Hatfield: On the business that you're holding for him now—how does it stand?

Hart: Well, on the business that we're holding now, I don't have any particular breakdown—I have it over-all. I can give you that if you want to hold [56] on a second.

Hatfield: Can you, please?

Hart: Sure. Just a minute. (Sam, would you give me that book on that table, please—under that table—both books—yeah—that's it—yeah—thank you.) Just a second, Jerry.

Hatfield: All right, Mark.

Hart: We have a loss ratio—now let me point this out—he's written with us \$355,000 (yeah) and he's only earned about \$100,000.

Hatfield: I see.

Hart: So it's not seasoned yet—you see, we got in on the tail end.

(Testimony of Gerald A. Hatfield.)

Hatfield: Yeah.

Hart: And his loss ratio's in the low 70's.

Hatfield: Low 70's?

Hart: Yeah. Now, it's improving.

Hatfield: It is improving?

Hart: Yeah, it has every indication of improving. We have one of his accounts has a 46% loss ratio.

Hatfield: Oh, I see.

Hart: 46.7—and the other appears to be improving. His average loss is excellent. His average premium could stand a little jacking up. But here's one thing I want to point out to you, too. [57]

Hatfield: Yeah.

Hart: You have—you got in on the better rate.

Hatfield: Yeah.

Hart: See—so if you judge his experience, you should take into consideration the rate differential.

Hatfield: Yeah.

Hart: In other words, you came up—I think your rate goes as high as 75% above manual.

Hatfield: About 170.

Hart: That's right—and very frankly, we went ahead and more or less copied yours, so we didn't have any——

Hatfield: You did?

Hart: Yeah, we liked your rates. No, no—I'm sorry, I'm sorry—we didn't copy yours—we copied Associated Veterans.

Hatfield: Oh, you're still operating under three different——

Hart: That's right, that's right. We liked yours,

(Testimony of Gerald A. Hatfield.)

but by the time we had gotten the higher rates in, Joe Lotz quit us in favor of you.

Hatfield: I see.

Hart: So our experience does not reflect the better rates, See?

Hatfield: I see. [58]

Hart: So I just want to—I'm not trying to sell you anything—I'm just trying to have you take that into consideration.

Hatfield: Yeah.

Hart: I have every reason to believe that this business is being—this I will assure you, and you have my word for this—that we are not anxious to rewrite from the standpoint of loss experience.

Hatfield: Well—

Hart: That has no bearing on it.

Hatfield: You didn't kick them out, I know that.

Hart: No. Want to get through—no, we didn't kick them out. Of course not. So, Jerry, if everything's all right, will you wire me tomorrow?

Hatfield: I sure will, Mark.

Hart: And say that you will accept the rewrite and that you will look to Joe Lotz for the premiums?

Hatfield: Yeah.

Hart: All right. I'll anxiously wait for it because we'll have a big clerical job to do.

Hatfield: Yeah, yeah.

Hart: Some of them will go back to August, but there will be no losses charged to you whatsoever.

Hatfield: Well, that's a big difference then.

(Testimony of Gerald A. Hatfield.)

Hart: Sure, I know how you feel—I'd feel the same way. Okay, fella.

Hatfield: Thanks for calling me, Mark.

Hart: Now I'll look forward to seeing you next week. Goodbye."

Mr. Garrison: Q. Is that the conversation that you had with Mr. Hart?

A. That sounds to be it, yes.

Mr. Garrison: We will ask this be received in evidence as Plaintiff's Exhibit next in order.

The Court: Be admitted and marked next in order.

The Clerk: Plaintiff's Exhibit 5 admitted and filed in evidence.

(Whereupon the document, transcript of telephone conversation between Mark Hart and Gerald Hatfield, was received in evidence and marked Plaintiff's Exhibit 5.)

Mr. Garrison: You referred to a statement made by you and an answer by Mr. Hart in your previous reference to the conversation which I did not notice in the transcript. Do you believe there was some other statement made that did not appear in the transcript?

A. Yes, I believe there was.

Q. And what do you believe that to be?

A. I believe I asked Mr. Hart specifically if Joe Lotz was broke.

Q. What did you believe Mr. Hart said to you?

A. I believe he said, "Not that I know of."

Q. But that didn't come out in my reading. And

(Testimony of Gerald A. Hatfield.)

at this time when you had that conversation you had not received any information from any source, or anyone, that Mr. Lotz was broke?

A. No, sir.

Q. Now, what had you been doing from the time you received the six or eight hundred dailies from Lotz until the time when you went out to Oakland with respect to Mr. Lotz' affairs?

A. Well, we have already talked about the letters and the telephone conversations regarding this Public Service business, and in the meantime I had talked to Mr. Oldberg in Los Angeles and also sent him copies of the correspondence, I believe, although I am not certain on that point. Anyway, as a result of talking to Mr. Oldberg he made visits to Mr. Lotz' office in Oakland to assist him in doing the corrections that I had insisted upon.

Q. Had you received from Mr. Lotz a payment on his account in October?

A. Yes, sir, we did.

Q. And was that before you went to Oakland?

A. Yes, sir.

Q. You recall the amount of that?

A. I think it was in the neighborhood of \$27,000.

Q. And that was for business written, the 75—the two and [61] one fourth months previously?

A. That is right.

Q. That would be the month of July, the business?

A. July, that is correct, July it would be.

(Testimony of Gerald A. Hatfield.)

Q. In other words, you refer to that in the business as the July account?

A. That is correct.

Q. So that all during that period his account was current with you? A. That's right.

Q. Now, you referred to your arrival in Oakland, I believe you and Mr. Czar?

A. Yes, sir.

Q. You met the people that you mentioned, and did you have conversations with Mr. Smead and Mr. Lotz regarding this Public Service business?

A. Yes, sir.

Q. And I believe you also talked with their attorney, Mr. Mead? A. That's correct.

Q. What was their first report to you regarding the general condition of the Lotz agency?

Mr. Bronson: We will object to that as too indefinite, Your Honor.

The Court: Reframe your question. [62]

Mr. Garrison: Yes.

Mr. Garrison: Q. When did you first arrive, and after your arrival when did you see Mr. Lotz and Mr. Smead first?

A. We arrived on the morning of November 24, and I think our first meeting with Mr. Lotz was that afternoon.

Q. And did you have a conversation with him?

A. Yes, we had.

Q. Who was present?

A. At that time it was Mr. Czar, Mr. Oldberg, Mr. Kledzik, Mr. Lotz and myself.

(Testimony of Gerald A. Hatfield.)

Q. Not Mr. Smead?

The Court: Where was it?

The Witness: This conversation took place in the Leamington Hotel in Oakland.

Mr. Garrison: Q. Who is Mr. Kledzik?

A. Mr. Kledzik was also our representative in Los Angeles, but had been replaced by Mr. Oldberg.

Q. I see. And Mr. Smead was not there?

A. Not in our first meeting, I don't believe.

Q. What was the conversation between yourselves and Mr. Lotz on that occasion?

A. Well, our conversation was altogether to do with how much and how bad off he was financially.

Q. Just tell us what was said, not the——

A. In that conversation he stated that he thought he was [63] about \$100,000 short, and he thought there was no doubt about it, he could work out of it all right and eventually, if we would work along with him and cooperate with him, get us paid off in full and we would all come out all right on it.

Q. And thereafter did you have a conversation with him again with Mr. Smead present?

A. Yes, we had conversations with Mr. Smead when he was present.

Q. When was the next conversation?

A. Probably the next morning.

Q. Where?

A. At the Leamington Hotel.

Q. Who was present?

A. I think at that time Mr. Smead and Mr. Lotz

(Testimony of Gerald A. Hatfield.)

was there, and probably Mr. William Mead, his attorney.

Q. You were staying at the Leamington, were you? A. Yes, sir.

Q. And what was the conversation on that occasion?

A. Well, the conversation was more about how we could continue to keep Joe operating to come out of this financial difficulty he was in. In other words, we were still trying our best to cooperate with him.

Q. You wouldn't be permitted to talk about that, you can just now give the conversations.

Were there any written documents prepared up to that time? [64]

A. Not up to that time, no.

Q. That conference had to do, you say, with the working out of Lotz' problems?

A. That's right. We discussed many factors that would be involved in working with him.

Q. Did you see him during this time at his office at all?

A. No, we didn't go to his office either the 24th or the 25th.

Q. All right. When did you talk with him next?

A. We talked with—oh, we talked with him again the following day.

Q. Where?

A. At the Leamington Hotel again. You see, this all happened on a weekend.

Q. I see.

(Testimony of Gerald A. Hatfield.)

A. This is Saturday and Sunday.

Q. I see, that is why you were at the Leamington, and who was present on this third occasion?

A. His attorney, I believe, Mr. Mead. I don't know whether Mr. Smead was there on Sunday or not.

Q. Was anything said by Mr. Lotz or Mr. Smead regarding the nature of their financial embarrassment?

A. Yes, Mr. Lotz did make the statement that he thought he was probably about \$100,000 in the red.

Q. Did he say how he had gotten that way, or anything else [65] about it?

A. He explained that his operating costs had put him in that condition and that he readily admitted that he was paying brokers too high a rate of commission.

Q. All right, and in these three meetings the same subject was discussed, the rehabilitation of the Lotz account?

A. That's correct.

Q. Anything said up to this time about the Public Service business?

A. No, sir.

Q. Anything said about his meeting with Hart in New York and the cancellation of the American Fidelity and Casualty agency contract?

A. No, sir.

Q. Then when did you next see him?

A. Well, I think perhaps the following Monday I did visit his office.

Q. You went to his office?

(Testimony of Gerald A. Hatfield.)

A. Yes. Let's see, let me get the date straight here. The 24th was Friday, the 25th Saturday, 26th Sunday—the reason I remember those dates is because it was the day after Thanksgiving—so the 27th would be Monday.

Q. All right, and what happened on Monday?

A. On Monday we had a further conference with Mr. Lotz and Mr. Smead and his attorney, Mr. Mead. [66]

Q. Where?

A. In Mr. Mead's office and also in the Leamington Hotel, and at that time Mr. Lotz submitted a letter to us telling us how he intended to operate his agency from that date on, and setting forth the various plans he intended to put into operation for us to permit him to continue in business with us.

Q. You know the date of that letter?

A. That letter is dated September—I mean November 27, 1951.

Mr. Garrison: You have a copy?

(Mr. Garrison showing document to Mr. Bronson.)

Mr. Garrison: Q. I show you an original letter dated Oakland, California, November 27, signed Joseph Peter Lotz, and ask you if that is the letter you have been referring to?

You don't have to read all of it, if you can identify it by just glancing at it.

A. This is the letter, yes, sir.

Q. I notice this letter is signed Joseph Peter Lotz, and then the witnesses William B. Mead,

(Testimony of Gerald A. Hatfield.)

Ralph L. Smead. Is that the Mead, the attorney you referred to? A. Yes, sir.

Mr. Garrison: If I may I will read this into the record.

“Oakland, California, November 27th, 1951.

“Mr. Gerald A. Hatfield, General Manager. [67]

“Mid-States Insurance Company, 182 West Lake Street, Chicago 1, Illinois.

“Dear Mr. Hatfield:

“I wish at this time, of my own free will and accord, to relate to you the facts and circumstances surrounding the financial difficulties in which I find myself today, and to explain to you in detail, to the best of my knowledge, how it happened.

“As far back as last July, I had been losing money and was unable to pay my account to American Plan Corporation and other debtors, and it became necessary for me to use trustee funds in the operation of my business. By August 31, 1951, I was insolvent to the extent of approximately \$100,000.00, and where I should have had approximately \$190,000.00 in the trustee account, there was only \$4,000.00 in hand and in cash in banks.

“The American Plan Corporation was insistent that I make a payment on my account, so I made arrangements with the Public Service Insurance Company to pick up approximately \$133,000.00 of insurance. I paid them a 25 per cent commission for this business which amounted to approximately \$33,000.00 and received from them a net amount of about \$100,000.00. I wrote [68] the insurance up in

(Testimony of Gerald A. Hatfield.)

the Mid-States Insurance Company, but instead of leaving it in the trustee account for Mid-States, I paid this money to American Plan on their bill. I still owed them around \$60,000.00 and so around the first of November I made arrangements with American Plan to cancel about \$60,000.00 worth of insurance I had written with them but had not paid for and switched this over to Mid-States.

"The result is that I am now unable to pay my account with you which will be due December 1, 1951, amounting to approximately \$64,000.00, and I don't know where the money is coming from to pay you for the Public Service or American Plan business and the other new business I have been writing; because the latest figures I have from my auditor are October 31, 1951, when I only have \$4,700.00 cash and \$95,000.00 due me from my agents and I owed companies \$361,000.00.

"I feel confident that by continuing to write insurance I can, by paying to you all income received by me in the operation of my business, pay you back all I owe in a short time. Here are the steps I propose to take to accomplish this:

"1. I have as of this date hired George Kledzik to be my general manager with full power [69] and authority to run my agency;

"2. I have limited my drawing account to a maximum of \$600.00 per month and have also limited my entertainment and travel expenses to a maximum of \$350.00 per month and have made other substantial reductions in overhead, and will make such

(Testimony of Gerald A. Hatfield.)

other necessary adjustments as recommended by Kledzik after he has studied the operation of the agency;

“3. I am going to take the necessary steps to reduce the advance commissions paid by me to my brokers as much as possible, and in some cases where a reduction is not agreeable to them, I will discontinue doing business with them;

“4. I will discontinue doing business with those of my brokers whose loss ratio shows them to be a potential loss account;

“5. I will agree to follow all underwriting and claim instructions issued by you to me pertaining to all existing and future business;

“6. I will see that a weekly progress report is given to you, in whatever form you may require, and will also submit to you a monthly operating statement and balance sheet by the twentieth day following the close of each calendar month.

“At any time you desire, I will execute promissory [70] notes to you, or any other documents you may require, in connection with any amount I might owe you.

“I hereby authorize Mid-States Insurance Company, or any of its officers, agents or employees to inspect and examine all the books and records pertaining to the operation of my agency at any time, and to pay all out of pocket expenses in connection therewith.

“I realize that I have violated my agency agreement with you, and agree that you are not waiving

(Testimony of Gerald A. Hatfield.)

and have not waived any rights accruing to you from such violation, and I further agree that you have the right to cancel my agency agreement, dated September 1, 1951, at any time without notice and with or without cause, and I hereby hold you blameless and harmless for any loss that I might sustain due to such cancellation by you.

"I agree to reimburse Mid-States Insurance Company for all expenses incurred by them in connection with the present trip of Messrs. Hatfield, Csar, Kledzik and Oldberg, but such expense shall not exceed \$1,250.00.

"I again want to ask your consideration of the above plan as a basis for the continued operation of [71] my agency, and will appreciate greatly any consideration you see fit to grant me.

Yours very truly,

Joseph Peter Lotz.

"Witness: William B. Mead, Ralph L. Smead."

The Court: What is the date of that letter?

Mr. Garrison: That is dated November 27.

The Court: 1951?

Mr. Garrison: 1951. I ask that this be received in evidence as Plaintiff's Exhibit.

The Court: Be admitted and marked, .

The Clerk: Plaintiff's Exhibit 6 admitted and filed in evidence.

(Whereupon the document referred to and read above, was received in evidence and marked Plaintiff's Exhibit No. 6.)

Mr. Garrison: Q. Were you present when that was prepared?

(Testimony of Gerald A. Hatfield.)

A. No, not when it was prepared.

Q. Where was it handed to you?

A. It was handed to Mr. Czar and me in the Leamington Hotel.

Q. And did you have any other conversation with Mr. Lotz or Mr. Smead that disclosed facts regarding his affairs over [72] and above those mentioned in the letter? A. No.

Q. That substantially paraphrased the conversations you had? A. That's right.

Q. After that what was done with that proposal?

A. That proposal was taken back to Chicago.

Q. By whom? A. By Mr. Czar.

Q. And did you subsequently receive some instructions from your home office in connection with it?

A. No, Mr. Czar left Oakland, I think about November 30 and took the proposal back with him to Mr. Titus. Mr. Titus then came out to Oakland on December 5.

Q. 1951? A. That's right.

Q. And he had conversations with Mr. Lotz and with Mr. Smead?

A. After he got here, yes.

Q. Yes. And were you present at any of those when Mr. Lotz was told that that suggestion, those suggestions were not acceptable?

Mr. Bronson: That assumes——

A. At that time——

Mr. Bronson: ——assumes it is a fact. I am going to object to it.

(Testimony of Gerald A. Hatfield.)

Mr. Garrison: Merely indicating the subject matter of [73] the conversation.

Mr. Bronson: I understand what you are doing, I am just making an objection that it assumes a fact not in evidence.

The Court: Objection sustained. Reframe your question.

Mr. Garrison: Q. Were you present at any conversation with Mr. Titus and Mr. Lotz and Mr. Smead at which time the subject of this proposal was discussed?

A. I don't remember being present, no.

Q. All right. Did you participate in these conversations with Mr. Titus, Lotz, and Mr. Smead after Mr. Titus arrived here?

A. Oh, I participated in conversations with them.

Q. Where was that held?

A. Up in Mr. Lotz' office.

Q. And who was present?

A. Mr. Lotz and Smead and on some occasions Mr. Mead.

Q. The attorney? A. Yes, sir.

Q. When did Mr. Titus arrive?

A. On December 5, 1951.

Q. And commencing with the first conversation, can you tell us what was said by each of the parties, eliminating immaterial matters, referring to the Lotz agency?

A. No, I don't recall the conversation, Mr. Garrison. [74]

Q. I see. Then did you yourself, without anyone

(Testimony of Gerald A. Hatfield.)

else present, have a conversation with Mr. Lotz on the subject of his situation generally?

A. Yes, I had had conversations with him before Mr. Titus arrived.

Q. And where had those taken place?

A. Well, several conversations took place in his office. Occasionally we had dinner together and talked over the table, but one conversation that really sticks in my memory is one that I had with him in his own car.

Q. What date was that?

A. That was on December 4.

Q. And where was it?

A. Well, on December 4, I had an appointment at the insurance department in San Francisco and Mr. Lotz offered to drive me from Oakland to San Francisco to keep that appointment. So we left Mr. Lotz' office then, got into his car about noon. The appointment was for two o'clock in the afternoon, as I recall, and on the way we were just talking back and forth and stopped in a drive-in for lunch.

During that conversation we were talking back and forth I said to Mr. Lotz, I said, "Joe, I'm greatly surprised and certainly lost a lot of my esteem in you for your ever entering into a deal like this Public Service deal without first asking me about it or telling me about it and getting [75] my approval. Why on earth did you ever do a thing like that?"

And his reply was, "Well, they wouldn't let me."

(Testimony of Gerald A. Hatfield.)

I said, "Who do you mean, they wouldn't let you?"

He said, "Ralph Smead and Mark Hart wouldn't let me."

"What on earth has Mark Hart got to do with this deal?"

After which he started to tell me then about the previous——

Q. Well, just tell us what he said.

A. Well, he told me that he had been to New York for a meeting with Mark Hart and the officers of the American Plan Corporation before he had come to Chicago and asked us for a new contract, and that the idea of securing a new contract with us was discussed in that New York meeting.

He also revealed that he owed American Plan a considerable sum on money and that he was receiving constant pressure for payment of such sums of money, and this trip back to New York was part of the pressure; also Mr. Hart and Mr. Feller, I believe, had visited him out here demanding immediate payment and——

Mr. Garrison: Pardon me. This will go on quite a while, Your Honor. Is it your——

The Court: Take an adjournment until ten o'clock.

(Thereupon an adjournment was taken until

May 4, 1954 at 10:00 o'clock a.m.) [76]

The Clerk: Mid-States Insurance Company versus Anglo California National Bank, American Fidelity, American Plan, et al, further trial.

Mr. Garrison: Ready. Mr. Hatfield.

The Court: A trial memorandum here was served on me last night. Who presented that?

Mr. McCallum: I didn't hear you.

The Court: Did you bring this?

Mr. McCallum: I presented one to the Clerk last night, also served copies on other counsel.

The Court: Very well. All right.

The Clerk: Gerald A. Hatfield, to the stand, heretofore sworn.

GERALD A. HATFIELD

a witness for the plaintiff, having been previously duly sworn, resumed the witness stand for further direct examination.

Further Direct Examination

Mr. Garrison: I was asking Mr. Hatfield at the adjournment about a conversation. I would like to interrupt that, if I may, and pick up a couple of items that I left out at an earlier date.

The Court: All right. [78]

Mr. Garrison: Q. You testified yesterday, Mr. Hatfield, about coming out to Oakland with Mr. Czar and having a meeting with Mr. Lotz at Mr. Mead's office in Oakland and receiving from Mr. Lotz and Mr. Mead the plaintiff's exhibit number 6, being the letter dated November 27 to you from Mr. Lotz? A. Yes, sir.

Q. Did you receive from them at that time any other documents? A. Yes, sir, we did.

Q. What documents did you receive?

(Testimony of Gerald A. Hatfield.)

A. We received from him both a power of attorney and an assignment.

Q. I show you a document entitled power of attorney and a document entitled assignment and ask you what those are?

A. This is the power of attorney which we received from Mr. Lotz.

Q. And this document is dated November 27, 1951, signed Joseph Peter Lotz and acknowledged by notary William B. Mead, is that correct?

A. That is correct, yes, sir.

Mr. Garrison: Ask this be received in evidence as Plaintiff's Exhibit next in order.

The Court: Be admitted and marked in evidence.

Mr. Garrison: That is apparently a form power of attorney, and I assume need not be read unless your Honor wishes it.

The Clerk: Plaintiff's Exhibit 7 admitted and filed in [79] evidence.

The Witness: This is the assignment form which we received.

(Whereupon the power of attorney above referred to was admitted in evidence and marked Plaintiff's Exhibit 7.)

Mr. Garrison: Q. And this likewise is signed Joseph Peter Lotz? And is acknowledged by notary William B. Mead? A. That's correct.

Q. And this is an assignment in apparently very broad language, and unless your Honor wishes I shan't read it, ask it be received.

A. Also dated November 27.

(Testimony of Gerald A. Hatfield.)

Mr. Garrison: Yes.

The Court: Be admitted and marked.

The Clerk: Plaintiff's Exhibit 8 admitted and filed in evidence.

(Whereupon the assignment above referred to was admitted in evidence and marked Plaintiff's Exhibit 8.)

Mr. Garrison: Q. I show you now another document which is not titled; ask you what that is.

A. This is the hold harmless agreement.

Q. And this was executed by Joseph Peter Lotz and acknowledged by notary William B. Mead on the 27th day of [80] November?

A. That is correct.

Q. Delivered to you at the same time?

A. Yes, sir.

Mr. Garrison: And this is likewise, your Honor please, in standard form and may that be received in evidence?

The Clerk: Plaintiff's Exhibit 9 admitted and filed into evidence.

(Whereupon the hold harmless agreement referred to above was admitted in evidence and marked Plaintiff's Exhibit 9.)

Mr. Garrison: Q. Now, you referred yesterday to two letters that were mailed by you, written by you, and mailed addressed to Mr. Lotz, being Plaintiff's Exhibits 3 and 4 dated September 28 and October 8.

A. Yes, sir.

Q. And you referred to a telephone conversa-

(Testimony of Gerald A. Hatfield.)

tion that you received from Mr. Lotz after those letters were mailed to him, did you not?

A. Yes, I referred to it.

Q. Now, did you receive any correspondence from Mr. Lotz after those letters were mailed?

A. Yes, Mr. Lotz replied to my letter of October 8 immediately.

Q. I show you a letter on the stationery of the —withdraw [81] that.

Show you a letter dated October 9, 1951 and ask you what that is?

A. This is a letter I received from Mr. Lotz in reply to my letter of October 8.

Mr. Garrison: I think this should be read, your Honor please. This is dated October 9, 1951 and says:

“Mr. Gerald A. Hatfield, Vice-President, Mid-States Insurance Company, 182 West Lake Street, Chicago, Illinois.

“Dear Jerry,

“Have your letter of October 8th, rest assured we are taking immediate steps necessary to comply with instructions set forth therein pertaining to short-term policies rewritten from Public Service Insurance Company.

“After a discussion with Ralph Smead of my office, I would like to pass along to you his reason for accepting this business. We wrote a similar block of this business July 1st of this year through the American Fidelity and Casualty Company and have

(Testimony of Gerald A. Hatfield.)

enjoyed a very good loss ratio, and it was felt the business written with your company would likewise prove profitable. These policies were not canceled by Public Service for underwriting reasons, but due to the fact they had overextended their writing and [82] were compelled by the California Insurance Department to reduce their liability. The business was not written on a hit and miss basis, but on entire individual agent's accounts. It was felt that since the business had been underwritten by the Public Service and seasoned, that it should run off fast and with a low loss ratio.

“Special endorsements pointed out in your letter are used on all military risks, therefore there should be no discrimination from that angle.

“I have instructed Ralph to cancel all policies with loss payable endorsements to those finance companies you mentioned. I also want to put the Mid-States back up where they belong and I will be on the ball at all times.”

“So far we have not had any perceptible amount of loss on this business, and I believe with the short term of exposure it will be o.k. We are very conscious of each agent's loss ratio, and will not permit any account to develop any bad ratio of loss for any length of time.

“Regarding embezzlement—the only embezzlement we are condoning is where the entire account has this item on every policy. We let one or two accounts in Los Angeles use this feature and it has been very favorable so far. Mr. Smead has two or

(Testimony of Gerald A. Hatfield.)

three accounts [83] who use it on all their business.

“I will be happy to visit with George and Karl tomorrow and will keep you advised of things fully.

“Best wishes.

“Yours very truly, Joe.”

Mr. Garrison: This stationery seems to be the stationery of American Fidelity and Casualty Company with a line drawn through American Fidelity and Casualty Company and says Ralph L. Smead, General Manager at the top of the letter. Apparently the stationery was simply borrowed for that purpose.

I ask this be received as Plaintiff's Exhibit next in order.

The Court: It may be admitted and marked.

The Clerk: Plaintiff's Exhibit 10 admitted and filed in evidence.

(Whereupon the letter above referred to was admitted in evidence and marked Plaintiff's Exhibit 10.)

Mr. Garrison: Q. Now, Mr. Hatfield, when we adjourned yesterday you were telling us about a conversation that you had with Mr. Lotz when you stopped in at a drive-in with him for some lunch, I believe, on December 4, on your way from Oakland to San Francisco to keep an appointment with the insurance commissioner. [84]

A. That is right.

Q. Mr. Lotz had agreed to drive you over. Now, would you give us that conversation, please?

(Testimony of Gerald A. Hatfield.)

A. Shall I start over again?

Q. Yes.

A. As we were riding along in Mr. Lotz' car I turned to him and I said, "Joe, my estimation of you has decreased tremendously because of the way you went into this Public Service deal without first informing me or asking me about it."

I said, "Why would you go into such a deal without contacting me and getting my approval?"

Joe replied, "I wanted to, Jerry, but they wouldn't let me."

I said, "Who wouldn't let you? What do you mean?"

He said, "Ralph Smead and Mark Hart wouldn't let me."

I said, "Mark Hart! Where does he fit into this picture." And with that Joe began to tell me all that had gone on.

Q. Just tell us what he said, don't paraphrase it.

A. Joe said his trouble began with the American Plan Corporation back in August of 1951 when his office had paid an account to American Plan in the amount of some fifty odd thousand dollars, and the check they issued in payment of that account was not cleared by the bank, it [85] was returned to American Plan. I think, for insufficient funds.

Joe said that that began a terrific pressure campaign on the part of American Plan to him, and also he was unable to pay them some six thousand odd dollars which was the commission he owed them on the previous Public Service rewrite with them.

(Testimony of Gerald A. Hatfield.)

He said that he had been under such terrific pressure, receiving telephone calls, teletype messages, sometimes two and three a day demanding immediate payment of his account, and pressuring him in all ways possible.

He then told me about being demanded that he and Ralph Smead fly to New York for a meeting with the American Plan officials, and he and Mr. Smead did go to New York.

During that meeting he told me it was discussed how he was going to pay his account, and sometime during the meeting the idea came up that he should contact Mid-States and see if he could get a new agency contract with us.

Also during that meeting, after this idea came about, a telephone call was put into Mid-States and was put in on a station-to-station basis so that Mid-States would not know where the call was originating. That call was made. I was not in the office, but my secretary got the call.

The next day Mr. Lotz appeared in my office, and I have [86] already testified as to how——

Mr. Bronson: Just a moment, he isn't stating what the conversation was.

Mr. Garrison: Pardon me, counsel.

Q. Just give us the conversation you had with Mr. Lotz when you were in the drive-in.

A. Well, he said that he was cautioned specifically before he came to Mid-States that he should not let us know at all he had been in New York to the American Plan offices. He also told me that he

(Testimony of Gerald A. Hatfield.)

had requested, or he had said he wanted to meet with Dick Cass while he was in Chicago and had been told by Mr. Hart he should not contact Mr. Cass because Mr. Cass might still be friendly to Mid-States.

He then told me about after our meeting in Chicago how he immediately went to his hotel and telephoned both Ralph Smead and Mr. Hart in New York advising them that we had agreed upon a new contract. And he told me then he returned to Oakland.

He told me that shortly after he returned to Oakland Mr. Hart and Mr. Feller of the American Plan visited his office in Oakland, and it was during that visit that the Public Service rewrite deal was engineered.

All through this conversation he kept repeating himself as to how frightened or scared he was of the pressure that was being brought on him, and I asked him, I said, "Joe, why [87] do you think that we would have been any easier on you than American Plan?" And he replied, "Well, he just felt we wouldn't have been as rough as American Plan."

Well, by that time I think I had arrived at the Commissioner's office and that ended the conversation. He waited for me, however, while I had my appointment with the Insurance Commissioner, and then he took me back to his office in Oakland. I don't recall that we talked about it much returning, because I was thinking so fast about it.

Q. You didn't have any further conversation.

(Testimony of Gerald A. Hatfield.)

Well, then, does that complete that conversation as best you can recollect it?

A. Except this: After he had told me all these things he said, "Now, what are you going to do?" And I said, "Well, this certainly puts a different complexion on the entire deal. There is only one thing I can do and that is report to Chicago immediately, I have to report it to our president." And Mr. Lotz begged me not to do it. "Joe, there is nothing I can do but do that." "What are they going to do?" "I have no idea what they are going to do."

I think that is about all the conversation.

Q. Is that the first knowledge that you ever had that Mr. Lotz and Mr. Smead had gone to New York just before you had your meeting with Lotz in Chicago? A. Yes, sir. [88]

Q. Is that the first knowledge that you had that Mr. Lotz had had a check returned in the sum of \$50,000 from the American Plan?

A. Yes, sir.

Q. Is that the first knowledge you had that the American Plan and Mr. Hart were acquainted with and participated in the Public Service so-called rewrite deal? A. Yes, sir.

Q. Is that the first knowledge you had that Mr. Lotz had used the moneys received from the Public Service rewrite deal to pay his account with Mr. Hart and American Plan? A. Yes, sir.

Q. What did you do then after that conversation?

A. Well, I returned to Mr. Lotz' office with him

(Testimony of Gerald A. Hatfield.)

and I talked to Mr. Smead and asked him, told him what Joe had told me, and he confirmed it.

Q. Well, just tell us where that took place and who was present and what was said?

A. That took place in Mr. Lotz' office in Oakland, and I think Mr. Lotz and Mr. Smead and I were the only ones present.

Q. On the same day?

A. On the same day, December 4.

Q. What did you say to Mr. Smead and what did he say to you? [89]

A. I told Mr. Smead that Mr. Lotz had told me what had happened in New York and what had happened prior to that time, and he verified that was true.

Mr. Smead also had some additional facts that Mr. Lotz hadn't told me, that very shortly,—he told me very shortly after Mr. Lotz had telephoned him and Mr. Hart from Chicago that we had entered into a new contract that American Fidelity had canceled their agency contract with him.

Q. Did he tell you when their contract with American Plan or American Fidelity had been cancelled?

A. I don't believe he told me the exact date, no, sir.

Q. Did he say whether they had cancelled it or whether American Plan or American Fidelity had cancelled it?

A. He said American Fidelity had cancelled it.

Q. All right, the other part of the conversation?

A. He also advised me that he had been ap-

(Testimony of Gerald A. Hatfield.)

pointed by American Plan to take care of the financial affairs of Lotz' office, and that Mr. Lotz had no authority whatsoever over the handling of money and funds, and that he had been directed by American Plan how the funds should be handled.

Q. Did he tell you how?

A. I don't recall that, Mr. Garrison.

Q. Then when you finished that conversation, what, if anything, did you do respecting this new information?

A. Well, this was in the evening of December 4, and I [90] immediately went back to my hotel, the Leamington Hotel, and put a long distance call to Chicago, called Mr. Czar, our legal counsel. I told him what I had been told and asked him what I should do. He told me that the best thing for me to do would be to try to get a written statement from both Mr. Lotz and Mr. Smead.

He also told me that Mr. Titus was leaving Chicago that night at midnight to come to Oakland.

Q. Mr. Titus being the president?

A. Yes, sir.

Q. Then what did you do?

A. Well, Mr. Titus arrived in Oakland on the morning of December 5, and he and I had a conference in the Leamington Hotel. I suppose that conference lasted for about an hour or an hour and a half. After the conference I went to the Lotz offices and remained there all day and half of the night.

Q. This is on December 5?

(Testimony of Gerald A. Hatfield.)

A. That is on December 5, yes, sir.

Q. And did you have a conversation with either Mr. Lotz or Mr. Smead on that day?

A. I told both Mr. Lotz and Mr. Smead that I would like for them to sit down and write out what they had told me the day before.

Q. And what did they say? [91]

A. Mr. Smead readily agreed to, but Mr. Lotz was hesitant about doing it.

Q. Did Mr. Smead write out a statement?

A. He wrote out a statement later on in the day, yes, sir.

Q. And where was he when he wrote it?

A. He was in the building which housed Mr. Lotz' office.

Q. That is where the Lotz agency was carried on?

A. That's right.

Q. And did you observe him writing it?

A. Yes, I saw him from time to time writing it. I don't—what I mean is, I certainly didn't stand there and watch him all the way through it, no.

Q. Where were you during that time?

A. He was writing the statement out on the first floor of this building, and I was on the second floor doing some underwriting work of Mid-States business.

Q. And as you went by you observed him as he was writing it?

A. That's right.

Q. Showing you a document consisting of, I believe, ten pages on legal yellow foolscap paper in

(Testimony of Gerald A. Hatfield.)

handwriting in green ink, and ask you if you will identify that.

A. Yes, this is the statement which he wrote out.

Q. And this statement is dated December 6, and it has on it a notarial acknowledgment, William B. Mead, the same person [92] referred to in the other documents as the notary? A. That's right.

Q. And was this—what happened to this document after it was completed by him on that day?

A. It was completed quite late, Mr. Garrison, at night, but when he finished it he came up to the second floor and gave it to me. I stuck it in my pocket and took it to the hotel with me.

Q. And what was done with it thereafter, if anything?

A. The next morning I again met Mr. Titus at the hotel and turned the statement over to him.

Q. What did he do with it?

A. Well, immediately he put it in the hotel safe deposit vault.

Q. I see. Well, now, when was the acknowledgment by Mr. Mead attached?

A. On December 6, in the evening.

Q. That is the following day?

A. No, it is actually the same day the statement is dated.

Q. In other words, started on the 5th, but completed after midnight? A. That is right.

Q. And therefore carried the date of December 6th? A. That is right.

(Testimony of Gerald A. Hatfield.)

Q. And when did you see Mr. Mead in connection with it? [93]

A. We had a meeting with Mr. Mead in his office the night of December 6, I think it was about 8 p.m.

Q. And who was present at that time?

A. At that meeting there was Mr. Joe Lotz, his son, Mr. Jack Lotz, Ralph Smead, Mr. Oldberg and Mr. Titus, and myself.

Q. What was done at that time with respect to this statement?

A. The statement was read orally by Mr. Mead.

Q. Yes.

A. And he would stop frequently and ask Mr. Smead if that was a correct statement, or if there were any corrections to be made. There were a few corrections, I think, made during the reading of it.

And finally when he finished reading it, he asked Mr. Smead if he was willing to sign it. He also asked Mr. Lotz if he was willing to sign it and Mr. Lotz then added a paragraph to it and also signed it.

Q. And you are referring now to the blue-black ink that appears in the margin of the tenth page signed Joe Lotz? A. That's right.

Q. And at that time Mr. Smead also signed it?

A. That's right.

Q. I notice in this document there are a number of scratch-outs and re-interlineations. Were some of those made that evening?

A. That's correct. [94]

(Testimony of Gerald A. Hatfield.)

Q. And Mr. Mead at that time affixed his notarial acknowledgment? A. He did.

Mr. Garrison: I think this is worth reading, if your Honor please.

"Joe Lotz Insurance Agency, 315-14th Street, Oakland, California, December 6, 1951.

"In the months of 1951, the above agency wrote business with the American Plan Corp. of New York until in August of 1951 there was a balance of some \$247,000 due said company. We found ourselves in a position of not having sufficient funds to meet monthly statements and when our check in the amount of \$50,301.88 in payment of April's business was forwarded on July 14, 1951 to the A/P it was returned a few days later by the Central Bank of Oakland for 'uncollected items.' This check was cleared a few days later. On 6-15-51 the A/P asked us for a financial statement of the Agency. The statement was never rendered by this office.

"We explained the situation to the A/P that we had some slow accounts and items had not been remitted to us. July 1st, 1951, this office made arrangement to reinsure a block of business from the P.S. Insurance Co. with A.F.C. with the understanding that 75% of [95] prem. would be paid by P.S. and 25% to be paid by this Agency. All arrangements were completed approx. August 1st, 1951 and on or about that date the P.S. forwarded check for their portion of the remittance to us, we were unable to attach our check for payment of 25% so we forwarded draft from P.S. to A/P on

(Testimony of Gerald A. Hatfield.)

8-3-51. They became disturbed as to the reason we were unable to make our remittance and again requested financial statement of the Agency. After a lapse of several days at which time we had not furnished the statement, Mr. Hart, President of the A/P called Joe via telephone and requested Joe and myself to come to N.Y. and to arrive there not later than Monday, August 13, 1951. We therefore made arrangements and arrived in the A/P office at approx. 12:30 p.m., 8-13-51 and"—

"We were invited into Mr. Hart's office and the following people were present at the discussion:

"Mr. Hart.

"Mr. Feller, counsel of A/P.

"Mr. Sudekum, exec. v.p.

"Mr. Will, treasurer.

"Mr. Lotz and myself."

"Numerous questions were raised by Mr. Hart and Mr. Feller pertaining to the finances of the Agency. Specific questions were asked of me. [96]

"Q. Amount of premiums owed companies?

"A. \$250,000 approx. A/P; \$29,000 M.S.; \$10,000 miscellaneous companies.

"Q. Amount of receivable?

"A. Approx. \$75,000.

"Q. What happened to moneys collected?

"A. Payment of advanced commissions and operating"—and the word operating has been written and scratched out——

"Operating costs.

(Testimony of Gerald A. Hatfield.)

“Various questions were asked by A/P pertaining to use of money by Joe.

“Questions were raised as to how we anticipated to pay account.

“I stated that we felt if we could continue to operate, we could, by maintaining a large float liquidate balance, we discussed M. S. Insurance Co. as a possible carrier and Mr. Hart had Joe place a call immediately to Chicago to Mr. Hatfield. Hart requested several times he didn’t want M.S. to know his position in matter and only wanted it paid and didn’t care how.

(Omission in the reading.)

“I believe Hatfield was out of town and did not see Joe until a day or two later. Hart remarked that if we could not get a connection with M.S. he had another retro carrier in mind he was sure we could get. [97] Hart told Joe to tell Hatfield that we were in N.Y. looking for a better deal and that they would not give it to us, so he wanted to start back with M.S. Hart told Joe to call him immediately from Chicago to let him know if M.S. would go along and gave him his home telephone number.

“During course of conversation question was raised, I believe, by Mr. Will, what will happen if and when M.S. statements cannot be met (if any recourse could be brought against them)——. Hart said he would worry about that if it should develop. At that time it was decided I should return to California immed. to work on May’s account, approx. \$66,000 due 8-15-51. Reservations were made for my

(Testimony of Gerald A. Hatfield.)

plane and that night at 11:30 p.m. and also for Joe to leave for Chicago the morning of 8-14-51. We then retired and made arrangements for a dinner the same night with Hart, Feller and Sudekom. During the evening topic was discussed and it was decided that matter hinged on whether M.S. would give Joe the green light. I told Hart I thought we could collect approx. \$40,000 for the May account by the 17th of August.

“After my return here on the 14th we had telephone conversations on 15 and 16 and collections weren’t good so on 17th we had teletype message to make reservation for Hart and Feller for Monday, August 20, 1951. [98]

“During days of 15, 16, 17 I discussed possibility of reinsuring business in amount of \$150,000 with Mr. Jim Russell, and John Shea of the P.S. Ins. Co. We had already discussed with Hart this possibility on the reinsurance bordereaux. I told Hart over phone about this and somewhere therein the thought of rewriting business on p/r unexpired basis was developed. I cannot definitely say whether the idea originated from Hart or was my own thinking. Anyway it was decided it would be a big aid in paying A.F. and C. as the picture as presented looked very good. I then hung up and called Joe at the Palmer House in Chicago and told him about it and asked him to discuss it with the company while he was there. We decided on his return that we must take the business which on 8-20-51 at night

(Testimony of Gerald A. Hatfield.)

we consummated the deal with Russell and Bond. During the day of the 20th while Mr. Hart and Feller were in the office, Hart was anxious to go see that the deal was o.k. with P.S. and had me telephone them to confirm it, he did not wish his name mentioned, however, and didn't want P.S. to know about him at all.

"On the 20th of August we had a meeting with Hart, Feller and Mead and discussed possibilities of obtaining a \$50,000 loan on guaranteed reserve of A/P through a connection of Mr. Mead. Mr. Mead told [99] Hart that he had worked on the deal sometime before and thought there was still a good possibility. The time was approx. 4:30 p.m. and Hart wanted Mead to call his party then. Mead said no, he would not bother his prospect at that hour. Hart said he would get loan at bank then and Mead dropped his efforts and Hart and Feller spent considerable time at bank but were unable to obtain loan. So it was decided the A/P Corp would make a \$50,000 loan to help take care of statement due 8-15-51. Joe gave Hart a check for \$20,000 on 8-20 or 21 from trustee funds. Feller and Hart worked up an agreement the night of 8-21-51 and morning of 8-22-51 which Joe signed on 8-22-51 and I accepted designation as representative of A/P. I was requested to visit Hart and Feller at their room in the Leamington Hotel on the night of 8-21-51 which I did. I was asked to be designated representative and accepted for benefit of Joe inasmuch as I understood they would bring someone else in unless

(Testimony of Gerald A. Hatfield.)

I did. On the morning of 8-22-51 Joe and I were asked to meet Hart and Feller at the Central Bank to read agreement. They were scheduled to leave for L.A. about that time and were in a rush to get out so Joe signed agreements and I agreed to be their representative. We did not have opportunity to have agreement checked by Joe's [100] attorney.

"As Mr. Feller was leaving he handed me a copy of agreement plus an additional document in a sealed envelope marked to me and personal. On examining this later I found it to be an offer of \$1,000 if balance was paid by 9-15-51. There had been absolutely no previous discussion of this. I called Hart the following night at his hotel in L.A. and told him I would have absolutely nothing to do with the receiving of any money. He said o.k. and I did not receive this money.

"We did not start actual mechanics of rewriting P.S. policies in M.S. until the first week of Sept. Hart called numerous times and wanted to know how long it was going to take and when he could expect money from that. He instructed us to deposit all normal checks direct to the account of A.F. and C. but to deposit any checks received from P.S. to Joe's trustee account and then issue a check to A.F. and C from trust account. We told him of a M.S. statement of approx. \$29,000 for June business due 9-15-51. He wanted it paid. However, due to his pressure we did not remit account until 10-15-51. We managed to pay A/P all of balance except approx. \$60,000 which amount in prem. value was

(Testimony of Gerald A. Hatfield.)

cancelled flat by A.F. and C. and rewritten [101] in M.S. Ins. Co.

“Supplementing the following:

“On August 13, 1951, while in New York in the American Plan office, Mr. Hart instructed his telephone operator in placing telephone call to Mr. Hatfield in Chicago, to make call station to station so Mr. Hatfield would not know Joe was in Hart's office.

“Around November 1, 1951 I had a telephone conversation with Mr. Hart about balance of approx. \$60,000 due A.F.C. and asked about possibility of reinsuring that amount with Mid-States Insurance Company and was informed by Mr. Hart that due to certain laws of the State of New York that reinsurance was not permissible. It was during this telephone conversation that Mr. Hart suggested that a premium volume amounting to the balance owing, be cancelled flat by A.F. and C. and rewritten in Mid-States Insurance and instructed me to call Mr. Hatfield in Chicago to see if arrangements could be made.

“Signed Ralph L. Smead.”

There is a notarial acknowledgment form attached dated 6 December, and signed William B. Mead, and in the margin on the left side in a different handwriting it says:

“I have the statements of Mr. Smead and as to all occasions when I was present it is a correct statement. [102] Joe Lotz.”

(Testimony of Gerald A. Hatfield.)

Ask this be received in evidence as our next exhibit.

The Court: Admitted next in order.

The Clerk: Plaintiff's Exhibit 11 admitted and filed in evidence.

(Whereupon the statement above referred to was admitted in evidence and marked Plaintiff's Exhibit 11.)

The Court: Take a recess.

(Short recess.)

Mr. Garrison: Q. Mr. Hatfield, were you furnished any other written statements by Mr. Smead at about that same time?

A. Yes, on the following day Mr. Smead recalled some other incidents that he thought should be added to this statement, so he wrote a supplement to the statement.

Q. Showing you another page—a one-page document on the same yellow foolscap paper and ask you if that is the statement you refer to?

A. This is the one, yes, sir.

Q. And this is dated 12-7-51 and reads as follows:

“Since making my statement of December 6, 1951 a few additional items have come to my attention which I think I should state:

“1. While in New York in Mr. Hart's office Joe [103] mentioned that he wanted to see Dick Cass and Hart said several times for Joe not to see Cass as he was afraid Cass might be friendly with some-

(Testimony of Gerald A. Hatfield.)

one at Mid-States and tell them what we intended to do. Joe promised him he would not see Cass.

"During a telephone conversation with Mr. Hart in November approx. \$60,000 premium volume of A.F.C. policies had been cancelled and rewritten in Mid-States Insurance Co., Mr. Hart asked me to destroy any teletype messages that were sent during course of liquidation that might be harmful to him.

"Ralph L. Smead."

Mr. Garrison: Ask this be received in evidence as Plaintiff's Exhibit next in order.

The Court: Be admitted and marked next in order.

The Clerk: Plaintiff's Exhibit 12 admitted and filed in evidence.

(Whereupon the statement above referred to was admitted in evidence and marked Plaintiff's Exhibit 12.)

Mr. Garrison: Q. Did you receive any other statements from Mr. Smead?

A. Yes, on the day following, I think December 8th, he wrote a further statement.

Q. I show you a longhand statement of three pages on yellow [104] paper, ask you to identify that, please.

A. This is the statement he wrote on December 8th.

Q. This statement, top of the page number 1 in a circle, 12-8-51:

"Concerning rewriting of Public Service short term policies in Mid-States Insurance Company. In

(Testimony of Gerald A. Hatfield.)

July of 1951 we arranged a reinsurance transaction for the Public Service Insurance Company with the American Fidelity and Casualty Company. This transaction amounted to approximately \$27,000 in premium volume and was handled on a reinsurance bordereaux. This transaction was completed in August of 1951. Approximately August 15 we were again approached by Mr. Shea and Mr. Russell of the Public Service Insurance Company and asked if American Fidelity and Casualty Company would be interested in an additional block of reinsurance amounting to approximately \$150,000 in premium volume. About this time our relationship was cancelled with the American Fidelity and Casualty Company, so reinsurance was impossible through that company. I informed Public Service Insurance Company on or about August 15 that A.F. and C. could not be interested in the reinsurance. It was necessary for Public Service to either reissue business or cancel. Idea was thought of to have Mid-States rewrite Public [105] Service policies on unexpired term. I was told that California Insurance Department required Public Service that their policies had to be cancelled before September 5, 1951. On August 20, 1951, agreement was signed by Joe to write this business that was being cancelled. Mr. Russell and Mr. Shea of the Public Service were in Joe's office at approx. 8:00 p.m. on 8-20-51. We agreed that Russell and Bond, general agents of Public Service, were to do all work in connection with the rewriting of this business and were to

(Testimony of Gerald A. Hatfield.)

receive an additional ten percent for this work. Policies and endorsements were furnished to Russell and Bond and work was performed by them and under their instructions. Russell and Bond, Inc. was appointed with Insurance Department as agents of Mid-States Insurance Company.

“A list of sub-agencies were furnished by Russell and Bond and their agents were appointed in the Mid-States Insurance Company.

“We had numerous verbal and telephone conversations with Mr. Shea and Mr. Russell. They were more insistent on the consummation of this deal than we were. They stressed the fact that this business would be very profitable first because it was in the later stages of the policies and second, that it was a high quality type of business from their better agents. And had it [106] not been for the constant pressure we had from Mr. Hart we would not have taken deal. Hart was demanding payment and Mr. Shea and Russell were aware of that fact. There was no written transaction other than commission agreement of 8-21-51 (?) when any details developed they were either handled by phone or Mr. Shea or Mr. Russell would come to our office.

“Signed Ralph Smead, Joe Lotz.”

Ask that that be received in evidence as Plaintiff's Exhibit.

The Court: Be admitted and marked.

The Clerk: Plaintiff's Exhibit 13 admitted and filed into evidence.

(Testimony of Gerald A. Hatfield.)

(Whereupon the statement above referred to was admitted in evidence and marked Plaintiff's Exhibit 13.)

Mr. Garrison: Q. Now, after completing these—or after receiving, I should say, these statements, what did you do?

A. After receiving those statements Mr. Titus and I left for Los Angeles on December 9, I believe. At the same time we had made arrangements to meet Joe in Santa Monica on December 10, which I believe was a Sunday. Joe was going to Santa Monica to try and collect some premiums due him from one of his sub-agents. At that time he was [107] also to give Mr. Titus his written statement——

Q. Now, my question I had reference particularly to anything you might have done in connection with the Lotz agency and the business that they had on the books.

A. All the time I was there I was busy doing underwriting work trying to purify the business written in Mid-States so it might be liveable and come out with a profit of some kind.

Q. What do you mean by that? That is terminology that I am not familiar with?

A. I mean, picking out sub-standard risks and canceling it or change it by endorsement so it would not be quite so substandard.

Q. And improve the class of the business?

A. That's right.

(Testimony of Gerald A. Hatfield.)

Q. Grade of business. And did you do anything——

Mr. Bronson: I didn't hear enough. This refers to what date?

Mr. Garrison: I said trying to improve the class.

Mr. Bronson: I lost more than that, ask the reporter to read the answer. May I have that, your Honor.

(Record read by the reporter.)

Mr. Garrison: Were you doing this work on the policies that had been cancelled, Public Service policies that had been cancelled and rewritten in Mid-States? [108]

A. Yes, sir.

Q. What did you find with respect to the class of business that had been taken over from Public Service as to whether it was standard or sub-standard.

A. I found out the majority of it was sub-standard.

Q. And it was business which, in your opinion, could not be underwritten profitably?

A. That's correct.

Q. Then did you have a chance to look at the books that Mr. Lotz was keeping or not keeping, as the case may be?

A. Yes, we had the opportunity to look at them. I think I forgot to tell you that before Mr. Titus left Chicago on December 4 he had ordered the auditing firm of Lester, Herrick and Herrick to come in and make a complete audit.

(Testimony of Gerald A. Hatfield.)

Q. What was the condition of Mr. Lotz' books at that time?

A. They were in a deplorable state.

Q. In respect to what?

A. In respect to postings, in respect to—in all respects, just hadn't been kept up to date, far behind, you couldn't tell the exact status of the Agency at all.

Q. Had you ever had occasion in previous months or years to see his books?

A. No, sir, I had not.

Q. And did Lester, Herrick and Herrick come in and make [109] a complete audit of the Lotz accounts?

A. Yes, sir.

Q. And did they render you a written report?

A. Sir?

Q. Did they render a written report of their audit?

A. Yes, sir.

Q. Do you know how long it took them to complete that?

A. Yes, it took them quite a long time, I think in the neighborhood of a month or six weeks.

Q. And then at that time, you were, I take it, not cancelling all of the policies that had been written by Lotz?

A. No, sir, that's correct.

Q. Why was that?

A. Well, at that time, we were still trying to work out a workable solution to keep the Lotz Agency in business and also, perhaps, stay with a

(Testimony of Gerald A. Hatfield.)

portion of this business he had taken over and come out with a profit on it.

Q. And you are now speaking of the time prior to receiving the statement of Mr. Lotz in the drive-in restaurant?

A. Prior to that, and also for a short time after that.

Q. Then did you have a change of mind on that subject? A. Yes, we did at a later date?

Q. When?

A. I think our actual change of mind came about about December 9 or 10. [110]

Q. And what brought that about?

A. That's why we were in Santa Monica, and on December 10, I believe it is—anyway, it was a Sunday, Mr. Lotz came to the home of Mr. Oldberg where Mr. Titus and I were also visiting that Sunday afternoon.

Q. By appointment?

A. By appointment. We had arranged to meet him there before we left, that is correct. And he came in, I think it was, about four o'clock in the afternoon and gave Mr. Titus the statement he had written out. Mr. Titus asked him——

Mr. Bronson: Now wait a minute, I am going to object to the conversation. I am interpreting the question as between some officials of your own company?

Mr. Garrison: No, Mr. Lotz was doing that——

Mr. Bronson: Excuse me.

Mr. Garrison: Go ahead.

(Testimony of Gerald A. Hatfield.)

Mr. Bronson: You keep your voice up, if you will please, Mr. Hatfield.

The Witness: Yes, sir.

Mr. Bronson: I have difficulty hearing this morning.

Mr. Garrison: Q. Yes, give us that conversation. Who all was there?

A. At Mr. Oldberg's house?

Q. Yes.

A. Mr. Oldberg, Mr. Titus, Mr. Lotz, and myself. [111]

Q. What was said and by whom?

A. Well, the conference didn't last very long. Mr. Lotz told Mr. Titus that he had not been successful in securing the money held out from this agent in Santa Monica, and during the conversation Mr. Titus asked Mr. Lotz to whom the Public Service checks in payment of the premiums had been paid, and Mr. Lotz replied that the checks had been made payable to Mid-States Insurance Company.

Mr. Titus asked him if he had endorsed those checks and Mr. Lotz said he had, and deposited them into his trustee's account. With that the conference was ended and Mr. Lotz left.

Q. Did he say who got the money?

A. I don't recall whether he said that at that time or not.

Q. Then you made a decision to do what in respect to the business?

A. We decided at that time that things were in

(Testimony of Gerald A. Hatfield.)

such a horrible shape, no possible chance to try to salvage the Lotz Agency and keep it in business.

Q. What did you do as a result of that decision?

A. Well, Mr. Titus immediately flew back to Chicago to confer with Mr. Schimberg and also to confer with Mr. Hart.

Q. Mr. Schimberg being your general counsel in Chicago? [112]

A. That's correct.

Q. The gentleman sitting at this table?

A. That's correct.

Q. And who is the other person?

A. He had a conference with Mr. Hart in Chicago, American Plan.

Q. President of the American Plan. Then what did you actually do?

A. I went from Los Angeles back to Oakland, and then Mr. Titus returned to Oakland on December 13, and during—from December 13 to December 20 we were still both here in Oakland, I continued to work in the Agency and just do all the various detail tasks that were necessary to be done to protect our interests, and Mr. Titus——

Q. You made a decision, as I understood it, to do something else than you previously intended with the Agency. Now, I am asking you what did you do pursuant to that decision?

A. Well, we had decided at that time we couldn't go on.

Q. Yes, but what did you do? You made a decision and what were your actions?

(Testimony of Gerald A. Hatfield.)

A. Well, our decision was to cancel all this outstanding Public Service business.

Q. I know, but did you do it?

A. We did that, yes, sir. [113]

Q. How did you go about that, what does that involve?

A. The cancellations, the mass cancellations I am referring to was actually performed out of our home office in Chicago. The notices were all typed up, had to type an individual cancellation notice on each outstanding policy, and those notices were typed in Chicago around December 20 or 21, somewhere around there.

Q. What was done in the Oakland office pursuant to that decision?

A. Well, there were many items that had to be cleared up, such as endorsements, requested on these outstanding policies, cancellations agents had requested, and we spent our time, I spent my time in trying to get that cleared up before getting started on this mass cancellation.

Q. Yes. Did you make any arrangements for office space or hire any employees?

A. Oh, yes, at that time we decided to take over all property that had anything to do with Mid-States, and we received a letter from Mr. Lotz authorizing us to rent his office and to rent his equipment and to hire his personnel in pursuance of what we wanted to do.

Q. And what personnel did you employ?

A. We employed all the girls that were working

(Testimony of Gerald A. Hatfield.)

with him at that time, and also Mr. Kledzik, I think, we put back on our payroll.

Q. And the ultimate result of those activities was what? [114]

A. The ultimate result was that as far as Mid-States was concerned our business was gradually—we stopped writing business 100 per cent, we were writing no new business.

Q. Did you cancel Mr. Lotz' agency contract?

A. Yes, sir, we did.

Q. As of what date?

A. As of January 21, 1952, I believe.

Q. In connection with these terminating activities that you are referring to, did you receive from Mr. Lotz any letter agreement in connection with his office space and equipment?

A. Yes, sir, he gave us a letter.

Q. And when was that?

A. I think it was December 28.

Q. I'll show you a letter dated December 28 consisting of two pages with an exhibit attached and ask you if that is the letter you referred to?

A. Yes, sir, this is the letter.

Mr. Garrison: This letter is dated December 28, 1951, addressed to Mid-States Insurance Company, 182 West Lake Street, Chicago, Illinois:

"Gentlemen:

"Please be advised that I plan on limiting the size of my insurance agency business and plan on vacating the second floor area now occupied by me at [115] 315 - 14th Street, Oakland, California. I

(Testimony of Gerald A. Hatfield.)

hereby agree to rent to you all furniture and equipment owned by me and located on said second floor, as per the inventory attached hereto and marked Exhibit 'A'. Should you elect to rent said equipment, you shall have the right to do so for a period not to exceed one year for a total rental of \$1,200.00.

"This letter may be accepted as my consent to your employing any of the personnel now employed in my agency.

"It is agreeable with me for you to make arrangements to lease the said second floor space which I intend to vacate, and it is further understood that I shall not be liable for any rent for said space during the period of your occupancy.

"You are to have possession of all my books, accounts, and records covering my insurance agency business prior to this date. It is understood and agreed, however, that said books and records shall not be removed from the second floor area to be occupied by you, and I, my agents, and accountants shall have access to said books and records at any time during business hours. At such time as you have no further use for said books and records they are to be returned to me.

"You have previously cancelled my general agency appointment and I have executed assignments to you [116] representing moneys due me in connection with business written by the Joe Lotz agency. Nothing in this letter or our arrangements in connection with your cancelling this business shall be construed as an agency appointment or contract of

(Testimony of Gerald A. Hatfield.)

employment. It is further understood and agreed that your occupancy of the second floor space is an arrangement of convenience only, and shall not be construed as being connected with my activities as an insurance agent. I further agree to hold your Company and your agents and employees harmless by reason of their actions in the cancellation of any business written by me, the return of the premiums therefor, and the payment of claims arising thereunder, and no liability shall arise to you and them because of the use of any of my books and records because of postings or entries made therein or otherwise.

“Very truly yours, Joe Lotz.”

Then there is attached to it an inventory of property owned by Lotz enumerating a number of pieces of office equipment.

Ask this be received in evidence as Plaintiff's Exhibit.

The Court: Be admitted next in order.

The Clerk: Plaintiff's Exhibit 14 admitted and filed in evidence.

(Whereupon the letter read above with the attached [117] exhibit were admitted into evidence and marked Plaintiff's Exhibit 14.

Mr. Garrison: Q. Now, as I understand it then, you proceeded to cancel all business written by Joe Lotz?

A. Not entirely all of it, no, Mr. Garrison, but the greater portion of it, yes.

(Testimony of Gerald A. Hatfield.)

Q. And that was accomplished, you say, out of Chicago? A. Yes.

Q. And what was done then, with respect to the losses and endorsements and the cancellations?

A. We continued to operate our office on the second floor of that building for several months as a service office to the policy holders for the purpose of handling endorsements, handling claims, maintaining our claim office here, for a long time.

Q. And did you pay the losses that occurred?

A. We certainly did.

Q. And when you cancelled policies that had been written by Mr. Lotz, what was necessary to do in connection with the assured's interest in the matter?

A. On every policy we cancelled, we were obligated to pay back the unearned premium on each policy to the individual insured.

Q. In other words, the policy being cancelled before normal expiration, the assured having paid the premium, he was [118] entitled to be reimbursed for any portion of that premium that represented the unexpired portion of the policy, is that true?

A. For the pro-rata remaining portion, that's right.

The Court: Contract provide for cancellation?

The Witness: Yes, sir.

Mr. Garrison: Q. And was that necessary in the case where policies had been written in your Company and where you had not received the pre-

(Testimony of Gerald A. Hatfield.)

mium? A. Yes, sir.

Q. So that you paid, then, not only the losses, but the returned premium to the assured, even cases where you had not received any premium?

A. That's correct.

Q. And you had expenses in connection with the employees there? A. Yes, sir.

Q. And the travel that occurred back and forth between Oakland and Chicago?

A. That's correct.

Q. Do you know what the total amount of the writings were, the net writings by Mr. Lotz as of the time you discovered that condition and decided to cancel out?

A. I don't have that figure in my head. Could I see our auditor's report? [119]

Q. I will show you the schedule 1 that I referred to in my opening statement and that has been agreed by counsel as reflecting accurately the figures that appear on the books of the Mid-States Insurance Company, and ask if you can tell us what the total net premiums—written premiums were by Mr. Lotz?

A. The total net written premiums were \$196,-714.50.

Q. And I presume in this termination or liquidation of the Lotz Agency you received some cash receipts, did you not?

A. Yes, we received some cash.

Q. What would be the sources from which those would come?

(Testimony of Gerald A. Hatfield.)

A. From sub-agents who owed Joe balances on Mid-States policies. Also returned commissions from sub-agents on cancelled policies.

Q. In other words, was it part of your operation there to try to collect anything that was owed Mr. Lotz?

A. Yes, sir, we spent a great deal of effort trying to make collections.

Q. And how much was collected in that activity? A. \$60,015.50.

Q. And did you credit them on the net premiums that were written in order to arrive at your out of pocket losses? A. That is correct.

Q. And what did that net produce?

A. \$136,699. [120]

Q. Now, on any of the business that remained in effect, whether it was allowed to run the normal expiration or was cancelled, were any commissions earned by Mr. Lotz on any of that business?

A. Yes, sir.

Q. And how did you determine what commissions Mr. Lotz was entitled on any of those writings?

A. Well, we determined it in accordance with the contract we had with him.

Q. And what was that?

A. Well, that contract was that Mid-States was to retain 14 per cent of the earned premium dollar, and 86 per cent was to be credited to Mr. Lotz.

Q. And that 86 per cent of the earned premium was the fund out of which losses were paid?

(Testimony of Gerald A. Hatfield.)

A. That's correct.

Q. And loss expense?

A. That's correct.

Q. And then the residue, if any, was what Mr. Lotz kept as his commission? A. Yes, sir.

Q. Now, did you find that in this termination or liquidation of the Lotz business that he did actually in fact earn some commission?

A. Yes, sir, we did. [121]

Q. And how much did he earn?

A. He earned \$38,698.71.

Q. In other words, that was the amount that was left after all losses and all loss expenses were paid and your 14 per cent was taken out?

A. That's correct.

Q. Did you credit his account with that amount of earned commission?

A. We credited his account with \$37,835.39, which is the difference of \$863.32 because we had already paid him that amount. [122]

Q. In other words, he had a debit on his books and you took—you subtracted that?

A. We made a payment in September of '51 of that amount of \$863.32.

Q. Now, you incurred, you say, expenses for salaries and miscellaneous other items involving refunds to agents and other expenses?

A. Yes, sir.

Q. And how much was that?

A. The expenses you want to know, Mr. Garrison?

(Testimony of Gerald A. Hatfield.)

Q. Yes, the refunds, the returned premium refunds.

A. You want to know the returned premiums?

Q. Yes.

A. The returned premiums that we allowed amounted to \$156,330.73.

Q. You say you allowed it. What do you mean by that? A. I mean we paid them.

Q. I see. And then what were your expenses in handling the collection of any of these amounts?

A. That amounted to \$52,412.62.

Q. Those are your actual out of pockets?

A. That's correct.

Q. Now, we referred here to a litigation that was instituted by Mid-States against the Anglo bank. You are familiar with that litigation?

A. Yes, sir. [123]

Q. And that was for the purpose of making some collections that were felt due as a result of this Lotz activity? A. That's correct.

Q. And that litigation was settled, I believe, for \$37,500? A. That's right.

Q. And did you incur expenses for accounting and legal and other expenses in connection with that litigation? A. We did.

Q. How much were your expenses?

A. \$11,640.

Q. And did you credit the balance, the net difference from the \$37,500 recovery after deducting the expenses to Mr. Lotz' account?

A. Yes, sir.

(Testimony of Gerald A. Hatfield.)

Q. So that when you got through with the account and gave him credit for these items I have mentioned, charged him with all these expenses you referred to, what is the net loss that has been suffered by the Mid-States Insurance Company as a result of Mr. Lotz' activities?

A. \$281,746.96.

Q. I will take that back if I may.

Mr. Garrison: This document, Your Honor, is attached to the opening statement that I read at some length the morning of the first day, and I would like to ask that that exhibit [124] that is attached to the opening statement be made, be introduced in evidence as an exhibit. I would be very glad to substitute a copy of that, if that would be agreeable.

The Court: No objection? Admitted.

Mr. Bronson: Not involving us in any obligation or any admission of the appropriateness of the charges of damages in this case, Your Honor, that is all. In other words, we will make our objection to the items, if that becomes an issue in the case later, and I didn't want the allowance or the exhibit to go in evidence as carrying any admission.

The Court: It may go in subject to your motion to strike. That will cover your—

Mr. Bronson: Subject to motion to make, or on showing in connection with it, if it becomes an issue, as long as we are permitted to.

Mr. Garrison: Certainly, counsel is always entitled to make a showing, but this, of course,

(Testimony of Gerald A. Hatfield.)

wouldn't foreclose that. The witness has testified to the facts, however, and I simply wanted to put into the record a written statement of his testimony which is shown in this exhibit.

Now, he has testified to the actual facts and that evidence is in the record, and I think if he has any objection to the testimony of the witness the objection should be made at this time rather than at some other time. Whether the legal effect of these charges are may be something else, that is a question [125] of law, but as to the question of evidence, this man knows the facts and has testified to them, and unless there is objection to his testimony I assume that it stands as given.

Now, all I am doing now is suggesting that the record contain a tabulation which outlines his testimony and it wouldn't be any more objectionable than his testimony itself.

The Court: May be admitted and marked.

Mr. Garrison: Thank you.

The Clerk: Plaintiff's Exhibit 15 admitted and filed in evidence.

(Thereupon document referred to above was received in evidence and marked Plaintiff's Exhibit No. 15.)

Mr. Garrison: I have another subject to start but I notice it is almost 12:00 o'clock.

The Court: If there be no objection you can go to lunch.

Mr. Garrison: Thank you, Your Honor.

(Thereupon an adjournment was taken until the hour of 2:00 o'clock p.m., this date.) [126]

GERALD A. HATFIELD

resumed the stand on behalf of the plaintiff and having previously been sworn testified further as follows:

Direct Examination—(Continued)

Q. Referring back, Mr. Hatfield to the so-called American Fidelity rewrite deal, which is the one you testified to that involved conversations with Mr. —telephone call from Mr. Smead and some wires that went back and forth between you and Mr. Smead, and the one that had to do with the telephone conversation with Mr. Hart, which had been monitored or recorded at Mr. Hart's end of the line, and I read the transcript of that telephone conversation, do you recall that? A. Yes, sir.

Q. You recall that incident. And I believe you testified that deal had to do with taking over a certain amount—volume of business that had previously been written on the American Fidelity Company and placed on the books of Mid-States Insurance Company? A. That's right.

Q. And in that conversation that I read—the transcript which I read, Mr. Hart asked you, told you, rather, that you were to look to Mr. Lotz for payment of those premiums?

A. That's correct. [127]

Q. Did you, after that telephone conversation with Mr. Hart, send him any wires pursuant to his request?

A. Yes, on the following day I sent him a telegram.

(Testimony of Gerald A. Hatfield.)

Q. And what date was that?

A. November 1, 1951.

Q. Show you a copy of a telegram dated November 1, 1951, addressed to Mr. Mark M. Hart, New York City, and ask if that is the wire you have in mind? A. Yes, this is the one.

Q. And that wire is Western Union, charge Mid-States Insurance Company, dated November 1, 1951, telegram.

“Mr. Mark M. Hart

“American Plan Corporation

“44 Wall Street

“New York, New York

“We Agree To Rewrite Group Of Policies On Which You Permit Joe Lotz Agency To Cancel Flat with understanding We Will Not Assume Any Outstanding Claims. We Will Look To Lotz For Payment Of Premiums.

“Gerry Hatfield.”

Ask that this be received in evidence as Plaintiff's Exhibit next in order.

The Court: Be admitted.

The Clerk: Plaintiff's Exhibit 16 admitted and filed in evidence. [128]

(Whereupon the telegram above read into the record was admitted into evidence and marked Plaintiff's Exhibit 16.)

Mr. Garrison: Q. Now, when you sent that telegram to Mr. Hart, did you know Mr. Lotz was insolvent? A. No, sir.

Q. Had you know Mr. Lotz was insolvent would

(Testimony of Gerald A. Hatfield.)

you have agreed to accept that business and look to Mr. Lotz——

Mr. Bronson: We will object to that, speculative, your Honor please.

The Court: What he might have done?

Mr. Garrison: Would he have accepted the business and looked to Lotz for payment had he known Lotz was insolvent.

The Court: Overruled. He may answer.

A. Well, of course not, that was—simply have increased Mr. Lotz' indebtedness by \$61,000.

Mr. Garrison: Cross-examine.

Mr. McCallum: On the order of proof on this matter do I proceed next? I have an interest of a plaintiff here in this proceeding and would you wish——

Mr. Bronson: Your Honor, I am happy to have Mr. McCallum go ahead any time he wants to in this case.

The Court: You go ahead.

Mr. McCallum: I shall proceed. Thank you.

Cross Examination

Mr. McCallum: Q. Mr. Hatfield, have you ever had any correspondence with Mr. Lotz on the subject of whether or not he was authorized to endorse checks made payable to Mid-States Insurance Company? A. Yes, sir.

(Colloquy between Mr. Bronson and Mr. McCallum inaudible to the reporter.)

(Testimony of Gerald A. Hatfield.)

Mr. Bronson: You have reference to the middle paragraph on here?

Mr. McCallum: Yes.

Mr. Bronson: If your Honor please, counsel has handed me a group of letters here dated in late August and in early September that refer to the subject of authorization of Lotz in connection with the deposit in the Anglo Bank. Now, it is our position that those are absolutely irrelevant here, that is a matter of settlement of that case and had judgment entered on the settlement, and if we are to try it over again that is a matter your Honor will do if you want to, but we see no relevancy here. I would like, if counsel will, state his purpose so that we understand it.

The Court: You may indicate for the purpose of the record the purpose of this offer.

Mr. McCallum: Our position is this, your Honor: If there was a conspiracy as has been alleged and which we believe [130] there was, the Bank was a party injured in carrying out that conspiracy. As part of this conspiracy funds were taken that were made payable to Mid-States Insurance Company and put into a trustee account maintained by Joe Lotz by the Anglo Bank; that Joe Lotz, in carrying out that conspiracy, represented and stated to the Anglo Bank that he had authority to endorse those particular checks and to deposit them in his trustee account; that he made that representation for the purpose of gaining control of those funds; that he then took those funds and paid them over

(Testimony of Gerald A. Hatfield.)

to the American Fidelity and American Plan companies; that at the time he told the Bank that he had authority to endorse these checks and obtain these funds, only he had no authority to endorse the name of Mid-States on those checks, and the position of the Bank is that as an injured party, injured in the performance of carrying out the plan of conspiracy to take funds and to use them to pay off the indebtedness of Mr. Lotz to the American Fidelity Company.

Mr. Bronson: The hole in that is he doesn't connect it up with us, we had no dealings with the American Bank whatever and until there is some sort of foundation laid, your Honor, I see no relevancy here.

Mr. McCallum: Any party injured in carrying out the conspiracy has a charge or claim against the parties who are responsible for that conspiracy.

Mr. Bronson: You have to have some evidence, it seems to me, your Honor, that this was something that we joined in and it was, in fact, a part of the conspiracy.

Mr. McCallum: It will be all joined in.

Mr. Bronson: The letters don't show it.

Mr. McCallum: Well, when the plaintiff's case is brought in, your Honor, the statements that are being made by Mr. Lotz and by Mr. Smead to the Bank were in the performance or carrying out of the agreement they made with these parties at this time to see that their bills were paid.

The Court: I will offer a suggestion, if it is

(Testimony of Gerald A. Hatfield.)

approved by both sides. Let the testimony go in subject to a motion to strike and over your objections.

Mr. Bronson: Very well.

The Court: And unless this so-called conspiracy is established, counsel concedes that of course it wouldn't prevail. Am I correct in that?

Mr. McCallum: That is correct, your Honor.

Mr. Bronson: Yes, and here is another thing, your Honor, the motion might be based on, that even though there were a conspiracy in some respect not reaching this particular transaction, but we'll——

The Court: Unless it is connected up.

Mr. Bronson: We will agree.

The Court: Your objection covers it, on a motion to strike [132] from the record.

Mr. McCallum: Very well, your Honor.

The Court: If that is agreeable. Is that agreeable, gentlemen?

Mr. Bronson: It is agreeable, your Honor, if that is the order of the Court.

The Court: Well, you indicate a better approach and I will consider it.

Mr. McKinnon: I might add one point to the objection, if the Court please. There has been no adjudication of the lack of authority. Mr. McCallum in the case protested most highly that the agent Lotz had full authority to endorse those checks, and he tried the case upon that protestation, exactly opposite of the position he has just taken, and the

(Testimony of Gerald A. Hatfield.)

judgment was one whereby he stipulated to it. No adjudication of a lack of authority of the agent Lotz to sign those checks. I would like to add that to the objection we made at the introduction.

The Court: The record will so show.

Mr. McCallum: Q. Mr. Hatfield, I show you what is a photostat of a letter dated August 27th addressed to you by Mr. Lotz and ask you if that is a photostat of a letter you received from Mr. Lotz? A. It is.

Mr. McCallum: May I read this to your Honor, please? [133] This letter is on the letterhead of the American Fidelity and Casualty Company and it bears the date of August 27, 1951, addressed to Mr. Gerald A. Hatfield, vice-president, Mid-States Insurance Company, 182 West Lake Street, Chicago, Illinois.

“Dear Gerald:

“Enclosed herewith is a Travel Master Policy which covers you for \$25,000 on any land, air, or water conveyance as a passenger. The rate on this policy is cheaper than the other plans which you buy at the airports and it eliminates a lot of extra effort. I hope that this is along the lines of what you want.

“Now, Gerald, this bank that I am doing business with wants a resolution from your Board of Directors verifying that I have authority to endorse premium checks payable to Mid-States Insurance Company for deposit in my trustee account. I would

(Testimony of Gerald A. Hatfield.)

appreciate it very much if you would send this authorization to me by return airmail.

"I suppose you read about that terrible wreck with a United Airlines plane. Incidentally, that was the same plane that I took the evening when you took me to the airport, so I missed it one week. I have a date with you in Chicago in six months and I hope by that time that I will have the guts to fly in as I sure don't feel [134] so brave today.

"I am lining up some more high grade finance companies for you, and may also close a retrospective account in Los Angeles for you soon.

"With best regards, I am,

"Yours very truly, Joe Lotz."

May we offer this as the Anglo Bank's Exhibit first in order?

The Court: Indicate for the purpose of the record the purpose of that offer.

Mr. McCallum: The purpose of that offer is to prove that Mr. Lotz was asking for a specific permission from Mid-States Insurance Company on August 27, 1951, to endorse checks made payable to Mid-States Insurance Company.

The Court: Proceed.

Mr. MacCallum: Q. Mr. Hatfield, did you answer Mr. Lotz? A. Yes, sir, I did.

Q. I show you what is dated, a letter, September 5, 1951, apparently on your signature, and ask you if that is your reply to Mr. Lotz?

A. Yes, sir, this is the reply.

(Testimony of Gerald A. Hatfield.)

Mr. McCallum: I ask permission to read this to your Honor. It is on the letterhead of Mid-States Insurance Company and bears the date September 5, 1951, airmail.

"Mr. Joe Lotz [135]

"315 Fourteenth Street

"Oakland, California

"Dear Joe,

"This is in reference to your letter of August 27th in which you requested authority from our board of directors permitting you to endorse premium checks which are made payable to Mid-States Insurance Company for deposit in your trustee account. I am not saying that we will not grant you authority but I want to suggest that the simplest way to eliminate your problem would be for you to instruct whatever accounts you have who presently make their premium payment checks payable to Mid-States that instead such check should be made payable to you. In this manner there could be no question about your endorsing the checks and placing the funds in your trustee account.

"You are completely familiar with the Donnelly mess of a few years ago and one of the principle reasons such happened was because Donnelly had authority to endorse Mid-States checks. After being burned as we were on that occasion I am sure you will understand why we are most hesitant to grant such authority again. As the old saying goes "once burned—twice shy" such is certainly our case.

"Please, Joe, give this suggestion your earnest

(Testimony of Gerald A. Hatfield.)

[136] consideration and if there is any reason why you do not think it will work let me know at once. Best personal regards.

“Yours very truly, Gerald A. Hatfield, Vice-President.”

Mr. McCallum: We offer this, please, as plaintiff's Anglo Bank next in order.

The Court: Be admitted.

The Clerk: Intervening plaintiff's Exhibits 1 and 2 admitted and filed in evidence.

(Whereupon the letters above read into the record were admitted in evidence and marked Intervening Plaintiff's Exhibits 1 and 2.)

Mr. McCallum: Q. Mr. Hatfield, did you write another letter to Mr. Lotz on this same subject?

A. Yes, I wrote a second letter.

Q. I show you what purports to be a letter addressed by you to Mr. Lotz dated September 10, and ask you if you sent that letter to Mr. Lotz?

A. Yes, sir.

Mr. McCallum: May I read this to your Honor? This letter also is on the stationery of the Mid-States Insurance Company, dated September 10, 1951, airmail.

“Mr. Joe Lotz

“315 Fourteenth Street

“Oakland, California [137]

“Dear Joe,

“Under date of September 5th I wrote you on the subject of granting you authority to endorse premium checks which are made payable to Mid-

(Testimony of Gerald A. Hatfield.)

States. I overlooked giving you the most important reason in that letter as to why we are reluctant to grant you the authority you requested. That reason is that under our blanket bond we do not have any protection if we grant authority to any person not on our payroll to endorse checks. I am sure you can realize how important this can be to us and I am merely passing this additional information to you for your consideration." Then there is a personal paragraph.

Offer this as Anglo Bank's Exhibit next in order.

The Court: Admitted and marked in evidence.

The Clerk: Anglo Bank's Exhibit number 3 admitted and filed in evidence.

(Whereupon the letter above read into the record was admitted into evidence and marked Intervening Plaintiff's Exhibit number 3.)

Mr. McCallum: Q. Did you receive a reply from Mr. Lotz to either of those letters?

A. I received a reply to the first letter, the one of September 5.

Q. I show you what purports to be a letter addressed to you by Mr. Lotz and ask you if you received that from him? [138] A. Yes, sir.

Mr. McCallum: May I read this to the Court, just one paragraph that replies to these letters, the only pertinent part. This letter is on the stationery of the American Fidelity and Casualty Company dated September 8, 1951, addressed to Mr. Hatfield and the third paragraph reads as follows:

"Now, regarding my request for authority to

(Testimony of Gerald A. Hatfield.)

endorse check made payable to the Mid-States Insurance Company, we do not have very many like this, and those that we do have, we can have them made payable direct to me.”

May we offer this as Plaintiff’s Exhibit next in order?

The Court: May be admitted and marked.

The Clerk: Intervening Plaintiff’s Exhibit 4.

Mr. Bronson: I would like to have you read, if you will, save me the trouble, the last Exhibit, the paragraph you omitted to read, the second one, would you read that to the Court?

Mr. McCallum: I would be happy to.

Mr. Bronson: And give the Court the date of the letter.

Mr. McCallum: Dated September 8, 1951. Second paragraph.

“We are not sending the American Fidelity and Casualty Company any business whatsoever—you are getting it all. We are using some very rigid underwriting and hope that our loss ratio will reflect better as a [139] result of our close scrutiny. However, Gerry, we feel that the rates could stand another 10% advance as we are quite a bit below companies operating on a like basis. The Associated Veterans Insurance Company has quit doing business in Northern California; the Public Service Insurance Company is going on a more restrictive basis, and all along the line the companies are tightening up. So we would not experience any difficulty

(Testimony of Gerald A. Hatfield.)

with a higher premium. We could be very selective in the choice of our affiliations.”

Mr. Bronson: Thank you.

(Whereupon the letter above read into the record was admitted into evidence and marked Intervening Plaintiff’s Exhibit number 4.)

Mr. McCallum: Q. Mr. Hatfield, did the Mid-States Insurance Company commence an action against the Anglo Bank before this Court about the same time as this current action was commenced?

A. Would you read that? I didn’t get it all.

Q. Did the Mid-States Insurance Company commence an action in this same Court against the Anglo California National Bank?

A. Yes, sir.

Q. And was that action brought against the Bank in connection with certain checks which Mr. Lotz had endorsed and deposited [140] in his trust account in that Bank?

A. That is correct.

Q. I show you, Mr. Hatfield, what appears to be photostatic copies of several checks and ask you if those are the checks which were the subject matter of the Mid-States Insurance Company’s action against the Anglo California National Bank?

A. Yes, sir, these are the checks.

Q. Thank you.

Mr. McCallum: May we offer these, please, as the Plaintiff Anglo Bank’s Exhibit next in order?

The Court: No objection?

(Testimony of Gerald A. Hatfield.)

Mr. Bronson: Well, all this is going in, I understand, subject to our——

The Court: Motion to strike.

Mr. Bronson: Motion to strike later, your Honor please?

The Court: They will be admitted and marked next in order.

The Clerk: Intervening Plaintiff's Exhibit 5 admitted and filed in evidence.

(Whereupon the checks above referred to were admitted into evidence and marked Intervening Plaintiff's Exhibit number 5.)

Mr. McCallum: May I call the Court's attention to these Exhibits, please? The first check is dated September 7, 1951, and is made payable to the order of the Mid-States [141] Insurance Company in the amount of \$5,547.25.

The second check is dated September 14, 1951, made payable to the order of Mid-States Insurance Company in the amount of \$67,500.

The third is dated September 24, 1951, payable to the order of Mid-States Insurance Company in the amount of \$11,250.

The fourth is dated September 28, 1951, and is payable to the order of the Mid-States Insurance Company in the amount of \$3,750.

The next is dated October 16, 1951, payable to the order of Mid-States Insurance Company in the amount of \$6,089.44.

Those checks are all made payable, or rather all drawn by the Public Service Company, and are the

(Testimony of Gerald A. Hatfield.)

so-called Public Service moneys that your Honor has been hearing about from time to time.

The other three checks, one drawn by Mr. George A. Fulmore, is dated November 16, 1951, made payable to Mid-States Insurance Company, in the amount of \$1,484.65, and the last two are drawn by Jackson Motor Sales, one dated October 13, 1951, payable to Mid-States Insurance Company in the amount of \$1,000 and one dated November 10, 1951 payable to Mid-States in the amount of \$800.00.

Each of these photostats show they have been endorsed [142] by Joe Lotz with a rubber stamp which the name, among other companies, appears Mid-States Insurance Company, Joe Lotz, trustee.

Q. And Mr. Hatfield, as a consequence of the action which your Company commenced against the Anglo Bank a judgment was entered against the Bank for \$37,500, is that correct?

A. That is correct.

Q. And as against those specific checks, which we just introduced, the Bank has paid your Company \$37,500?

A. That's correct.

Mr. McCallum: You may cross examine.

Mr. Bronson: Before I proceed with the cross examination if the Court please, there is a memorandum that has been prepared by my office which I mentioned to you at the start of the case. I don't propose, unless your Honor wants it, to interrupt the proceedings now, but I will hand it to your Clerk. It is very brief. Its virtue is brevity, and perhaps it will have more virtues, your Honor, but

(Testimony of Gerald A. Hatfield.)

you will have an opportunity to read that and I would like to have you do so, supplementing what I announced yesterday by way of opening statement.

The Court: Very well.

?

Cross Examination

Mr. Bronson: Q. Well, Mr. Hatfield, when did you tell [143] us this morning you first learned about the termination of business by Joe Lotz with the American Fidelity and Casualty Company?

A. I first learned of it in my conversation with Mr. Smead on December 4, I think is what I said.

The Court: '51.

The Witness: On December 4.

The Court: '51.

The Witness: '51, yes, sir.

Mr. Bronson: Q. Were you attentive to the reading of your last Exhibit, not the checks, put in by the Bank here? I call your attention to the first paragraph. It is addressed to you.

A. That's correct.

Q. What is the date of the letter?

A. The date is September 8. This letter, he merely mentions he is not giving American Fidelity and Casualty any business.

Q. What does that mean to you?

A. Means he simply quit of his own volition, doesn't mean, doesn't tell me they had cancelled his contract.

Q. You wanted them to spell it out that the

(Testimony of Gerald A. Hatfield.)

contract was cancelled, and when you referred to that this morning you were referring to the actual knowledge of the cancellation of the contract?

A. That's correct. [144]

Q. But you were aware on September 8 that they were getting no business right from the source of the business, Mr. Joe Lotz, weren't you?

A. That is what the letter states, yes, sir.

Q. You were aware of that when the question was asked you this morning about when they terminated their arrangements?

A. I must have been.

Q. In one of the letters here, Exhibit 3 or 4, that was put in in the early part of your testimony, there is a reference to somebody by GFC. What does that mean?

A. General Finance Corporation.

Q. And who is General Finance Corporation?

A. General Finance Corporation is our parent company.

Q. They own the Mid-States Insurance Company lock, stock and barrel? A. Yes, sir.

Q. And that is a finance company, is it?

A. Yes, sir.

Q. How big, are they nationwide?

Mr. Garrison: That is objected to as incompetent, irrelevant and immaterial——

Mr. Bronson: Withdraw it. It doesn't have any bearing upon this case.

Q. Now, I notice—this may be a little spotty, I will try to indicate to you, Mr. Hatfield, when I

(Testimony of Gerald A. Hatfield.)

am changing the [145] subject of my examination, because we can all get a little confused. This is on the subject that hasn't any direct bearing, but the last counsel that addressed questions to you noted each time that some correspondence appeared on the letterhead of American Fidelity and Casualty Company that came from Joe Lotz' office. You have seen that correspondence? A. Yes, sir.

Q. Here is an example of it, that is Plaintiff's Exhibit 1, and you see the designation American Fidelity and Casualty Company at the top, do you not? A. Yes, sir.

Q. What does it say right under that?

A. Joe Lotz, General Agent.

Q. Yes. Do you supply your general agents with similar stationery with the heading American Fidelity—I mean Mid-States Insurance Company?

A. We did at one time.

Q. Were you at this time in 1951?

A. I don't recall, Mr. Bronson.

Q. The fact that Joe Lotz, in writing to you, used the letterhead of the American Fidelity and Casualty Company had no significance, did it?

A. No.

Q. All right. Now, with regard to some testimony you gave yesterday, if not again today, you had reference to sub-standard [146] business.

A. Yes, sir.

Q. You remember the term being used both by yourself and by the questioner?

A. Yes, sir.

(Testimony of Gerald A. Hatfield.)

Q. Do you not? Well, substandard business can be profitable, can it not?

A. Any business can be profitable if it is written in the proper rate.

Q. Yes. Do your rates have to be approved when you are writing in California by the California Insurance Commissioner's office?

A. You do not have to have prior approval, no, sir.

Q. No, but you may be asked to justify a rate on a given type of exposure by that office, are you not?

A. That is correct.

Q. And you may justify your rate by your experience in writing it, is that true?

A. That's true.

Q. An on so-called substandard business—I will strike that for a moment.

The term might indicate anything from slightly, something slightly under standard to a deep deviation from standard risks, isn't that true?

A. Yes, sir. [147]

Q. And so the term substandard doesn't mean anything until you see how close to standard it is and on what rates it is written, isn't that true?

A. I go along with you on how close to standard it is, yes. I don't follow—

Mr. Garrison: Just a moment, let him finish his answer.

Mr. Bronson: I am going to let him finish, counsel.

(Testimony of Gerald A. Hatfield.)

A. (Continuing): I don't get what you mean by the rate.

Mr. Bronson: Q. Let me put it this way: It is perfectly acceptable business to an insurance company if it is properly rated, makes a profit, isn't that true? A. That's correct.

Q. And a large volume of Joe Lotz' business was substandard, was it not?

A. A relatively large volume.

Q. Yes. And that was true the day you first became acquainted with his business directly, that is, by the year 1950? A. Yes, sir.

Q. And you did take business profitably, did you not? A. Yes, sir.

Q. And you were glad to get the substandard business as long as it was profitable, weren't you?

A. Well, as long as it was offset by standard business, too. [148]

Q. Well, all right, but suppose it hadn't been offset by standard business at all, but the substandard business he turned in was all profitable, you would be glad to get it in that shape, would you not? A. Yes, sir.

Q. Now, you had a change of experience though, in Joe Lotz' underwriting in the beginning of the year 1951, did you not?

A. I think it was more about the middle of the year 1951.

Q. Well, I wouldn't like you to guess. Isn't it true you cast up every month as part of your office

(Testimony of Gerald A. Hatfield.)

accounting system, the loss ratios on a given general agent?

A. Isn't it true which? I didn't catch the question.

The Court: Read the question, Mr. Reporter.

(Record read by the reporter.)

A. That is true.

Q. So that every month of the year 1951 you knew what your loss ratio was on Joe Lotz' underwritings?

A. Yes, sir.

Q. Did you make it your business to look at them?

A. Yes, sir.

Q. Do you know what your loss ratio was with Joe Lotz on his underwritings in the first year 1947?

A. No, sir, I can't state that exactly; I would have to refer to the record. [149]

Mr. Bronson: If you will bear with me a moment, your Honor, I will see if I can assist the witness's memory on that and perhaps save trouble with reference to some accounting records.

Q. You remember testifying in the bank case on that subject?

A. No, I don't remember.

Q. Now, additional to the subject matter—well, here is the record. Withdraw that.

I have it here.

Mr. Garrison: May I see it?

Mr. Bronson: Oh, yes.

Mr. Garrison: Thank you.

Mr. Bronson: Should I read it and save time?

Mr. Garrison: Sure.

(Testimony of Gerald A. Hatfield.)

Mr. Bronson: I am going to read a portion of this—I have shown it to Mr. Garrison, your Honor, and save going through the routine of showing it to you and getting your approval. This is testimony taken in the bank case, page 176 of the volume I have here, and at the beginning of the morning session, May 11, 1953, ten a.m. I will try to excerpt the parts that are not on the subject. Question by McCallum:

“So in the continuity of events we would like to offer as part of Mr. Hatfield’s testimony the loss ratio [150] of the Joe Lotz Insurance Agency during the year 1947 as being 91.5 per cent.

“Mr. Garrison: Pardon me, before you give the figure, we object—” states grounds. Mr. McCallum argues. And then the Court:

“I will overrule the objection.

“Mr. Garrison: What is the figure?

“Mr. McCallum: 91.5.

“Mr. Garrison: Now, may my objection run to all these figures?

“The Court: Yes.

“Mr. McCallum: For the year 1948, 48.6; for the year 1949, 45.8; for the year 1950, 49.8; for the year 1951, 71.1.”

Now, of course the——

Mr. McKinnon: Mr. Bronson made an error, if I may call it to the Court’s attention, for the year 1951 it should be 71.1 per cent.

Mr. Bronson: Didn’t I read that?

Mr. McKinnon: You said 70.1 per cent.

(Testimony of Gerald A. Hatfield.)

The Court: I think he said 71. I accepted it as 71. Did you hear that, counsel?

Mr. McCallum: I thought he said 71.1.

Mr. Bronson: You will accept that correction?

Mr. McKinnon: Sorry, your Honor, I am the librarian, and [151] even librarians can make mistakes.

Mr. Bronson: Q. I am going to refer to the Public Service business briefly.

When is the first time that you heard about the Public Service rewrite?

A. When I received the group of daily reports in my own office.

Q. And that you fix as what?

A. November 27.

Q. Hadn't Mr. Joe Lotz told you about that in Chicago on August 14 or 15, 1951?

A. No, sir, he had not.

Q. Did he tell you he was taking on a large block of underwritings at that time and at that place?

A. No, sir, he did not.

Q. He was in your office, wasn't he, on August 15, 1951?

A. Yes, sir.

Mr. Garrison: Pardon me, Mr. Bronson, Mr. Hatfield said November 27, in reference to that date. He has previously testified to a different month, and I want to be sure.

Mr. Bronson: Are you correcting him?

Mr. Garrison: I am suggesting you give him an opportunity to correct the month if he made a slip.

(Testimony of Gerald A. Hatfield.)

Mr. Bronson: I am going to let you do it, if he needs correcting. [152]

Mr. Garrison: Q. What was the date?

A. September 27.

Mr. Garrison: You said November.

Mr. Bronson: All right.

Mr. Garrison: Even witnesses——

Mr. Bronson: Q. You want to be understood as saying when? A. Sir?

Q. Let us understand it, when did you say you first—— A. September 27, 1951.

Mr. Bronson: I am going to put it down to be certain.

Q. And you deny that Mr. Lotz either discussed a block of business by name or by not naming it as an underwriting that he was taking on at the meeting in Chicago that you say you attended somewhere around the middle of August, 1951?

A. Yes, sir, I deny that.

Q. It isn't that you can't remember it, you just know it didn't take place?

Mr. Garrison: If the Court please, the witness answered that question twice quite categorically. It seems to me it is arguing with him when he says can he remember or whether it didn't occur.

The Court: Are you positive about that?

The Witness: Yes, sir. [153]

The Court: Proceed.

Mr. Bronson: Q. All right. Now in any and all events as an officer of the company you can

(Testimony of Gerald A. Hatfield.)

cancel any business submitted to you by an agent at any time, isn't that right?

A. According to the terms of the policy contract, certainly.

Q. Yes. A. Yes.

Q. And you were free at any time to have the supreme authority to cancel any business, whether it comes in a single policy or in a large block, is that true? A. That's correct.

Q. And at the time you learned of this—of the Public Service underwritings, which you say was at the end of September sometime, was any immediate step taken to cancel them outright?

A. No, sir.

Q. You mentioned some delay between the time that the policies bore a date and the time when you saw them first in Chicago, is that right?

A. Yes, sir.

Q. And what period of time, roughly, was that?

A. Roughly two to three weeks.

Q. Now, how many Public Service policies in that group or portfolio were there roughly? I don't ask for the exact number. [154]

A. You mean in the entire portfolio?

Q. Yes.

A. Roughly about 1800 or 2000.

Q. And the first group you saw I believe you told the Judge was some six or seven hundred?

A. Yes.

Q. If that was done on a rewrite, let us say just

(Testimony of Gerald A. Hatfield.)

one girl working on it, could she do more than 40 or 50 a day?

A. You mean type 50 policies a day, is that what you're driving at?

Q. Yes, exactly.

A. A good girl can type about 50 policies a day, yes.

Q. Now, let us look at Joe Lotz. Do you know who prepared those policies?

A. I know they were prepared both in Mr. Lotz' office and in another office.

Q. They weren't done by the Public Service Company?

A. I don't know what other office it was, whether the Public Service or Russell and Bond.

Q. Russell and Bond have their office in Oakland, do they not?

A. No, it is in San Francisco.

Q. In San Francisco. Well, what became of those policies once they were written, where did Joe Lotz send them?

A. He sent them—you mean the original policies? [155]

Q. The rewrites.

A. Well, I mean you are talking about the original policies? Q. Yes.

A. He turned them over, over to—I can't answer, I don't know.

Q. Didn't they, as a matter of fact, go down to Los Angeles?

(Testimony of Gerald A. Hatfield.)

A. No, he didn't send the policies to Los Angeles.

Q. Aren't all the underwritings of Joe Lotz cleared through Los Angeles?

A. Well, I think what you are referring to is the daily reports and not the policies.

Q. What did you use first, a policy or daily report? A. Daily reports.

Q. All right. Where do the daily reports go first?

A. This particular group came direct to Chicago, to the best of my knowledge.

Q. What does that mean, that you don't know for sure?

A. No, I am pretty sure they came direct to Chicago.

Q. You mean that was a deviation from the normal order of sending them down to Los Angeles? A. Yes, sir.

Q. Well, how did that happen? Was there some instruction given to that effect?

A. No, sir.

Q. Well, then the delay in getting—first go to this. [156] The daily is prepared from the preparation of the policy itself, is it not?

A. Yes, sir.

Q. It is a carbon copy of the face sheet of the policy? A. That's right.

Q. So that whatever came forward to Chicago was something that was prepared as the policies themselves were being prepared?

(Testimony of Gerald A. Hatfield.)

A. Yes, sir.

Q. And you could account, could you not, even on that first group that came through, with the delay in writing up the policy, the mechanics of writing up the policies themselves, and mailing them?

A. I could account for it—I don't know what you mean.

Q. You said two or three weeks delay, I thought some point was being made that Joe Lotz held back these policies for some reason, that is what I am getting at.

A. I think he did.

Q. As a matter of fact, you got for every day in the mechanics of the time it takes to do it——

A. If he had submitted those daily reports to us on a daily basis, as he was supposed to do, they wouldn't have come in a group of six or seven hundred all at one time, so they were held back.

Q. Weren't the group stopped and held up in Los Angeles, [157] as a matter of fact?

A. No, sir.

Q. Do you know that now?

A. Yes, sir.

Q. A moment ago you said you weren't quite sure whether they came direct to you. You know it now, is that true?

A. I know it to the same degree I did a moment ago.

Q. Another matter on deviating. You mentioned the condition of Joe Lotz' account the year that you came there and referred to it as current. Is that true, 1950?

A. 1950, yes.

(Testimony of Gerald A. Hatfield.)

Q. I had some letters here that were produced for us which I am going to show you as a group.

Mr. Bronson: I will refer to this Exhibit, which we will put in evidence, if your Honor please, as a single Exhibit if there is no objection from counsel.

These are the so-called Dunning letters of 1950, and they comprise a group of about 20 letters, if the Court please.

Counsel, and my associate, calls my attention to the fact that some of them are wires. Would you look at these letters, please?

Mr. Garrison: We will stipulate, counsel, those were all sent and that they speak for themselves and may be introduced in evidence without any foundation or further [158] reference by the witness, and you may either read them or introduce them in a block.

Mr. Bronson: All right. I might say the examination by counsel was so different, that the letters show in almost every month in the year a dunning letter. In June there were two and in July there were three. In October, there were three, and in November there were two. In December there were three.

You can compare them later, if you wish.

Mr. Garrison: No. I think they speak for themselves, however.

Mr. Bronson: Yes, they do. But I want to point out to the Court some of these letters in this period

(Testimony of Gerald A. Hatfield.)

when the Mid-States' account was current, according to this witness.

Here is one of July 20, Joe Lotz, signed by Mr. Hamburg.

Q. Who is he, by the way?

A. At that time he was my underwriting manager.

The Court: This 1951?

Mr. Bronson: 1950, the year that this agency came under Mr. Hatfield's particular supervision and in which he has testified that the accounts were current for this year.

This July letter says:

"On July 12th we called your attention to the past due balance of \$14,754. We fully expected that [159] this account would be paid by now, however, we cannot find a record of your paying it."

The Witness: I think I should point out that is before I assumed control.

Mr. Bronson: The next letter I will read——

"Yes, but you testified about this, Mr. Hatfield, as I understood you.

"August 15 your account in the amount of \$15,076," and so on.

Telegram October 27. "We haven't received the check for \$21,000 odd past due August account. Remit as soon as possible."

September 26 wire shows a demand for a remittance of \$16,218 past due.

Mr. Garrison: If the Court please, I think counsel ought to read the letters, because the mere

(Testimony of Gerald A. Hatfield.)

fact that his account was not paid on the day due does not mean it was not ultimately paid and actually current and in fact the accounts were all paid.

Mr. Bronson: I have a little different idea.

Mr. Garrison: Read the letters.

Mr. Bronson: You mean read them in full?

Mr. Garrison: They are very short, just simply form letters.

Mr. Bronson: It is a simple matter, but I am going to [160] the assertion of this witness that it was a current account. We can test his veracity in more ways than one, counsel, certainly. That is the only point, if there is any argument about the propriety of these, your Honor.

I will read in full from now on. They are all addressed to Joe Lotz, and I will give the date and the contents of the message.

A wire June 27, 1950:

"Regret not having received \$131.80 December account and \$16,099.16 April account. Cannot understand delay. Please remit today."

July 26 wire, the day preceding:

"Regret not having received \$14,754 May account.

June account almost due. Please remit May account today."

Here is a letter dated June 9:

"Your April account in the amount of \$16,099.16 plus \$131.80 from December was due and payable

(Testimony of Gerald A. Hatfield.)

before the end of May, however, we cannot find where remittance has been received.

"We realize that it is easy to overlook items of this kind, however, we would appreciate your remittance for the \$16,230.96 past due account, within the next few days."

I will try to keep the rest of these in order, I didn't realize [161] they were so badly mixed up.

Here is a February 10 letter:

"Your December account in the amount of \$22,226.28 was due and payable before the end of January, however, we cannot find where remittance has been received.

"We realize it is easy to overlook items of this kind, however, we would appreciate your remittance for the \$22,226.28, past due account, within the next few days."

March 13 letter:

"Your January account in the amount of \$14,421.91 was due and payable before the end of February, however, we cannot find where remittance has been received.

"We realize that it is easy to overlook items of this kind, however, we would appreciate your remittance for the \$14,421.91, past due account, within the next few days."

May 19 letter:

"Your March account in the amount of \$31,114.75 was due and payable before the end of April, however, we cannot find where remittance has been received.

(Testimony of Gerald A. Hatfield.)

"We realize that it is easy to overlook items of this kind, however, we would appreciate your remittance for the \$31,114.75, past due account, within the next few days." [162] May 26, another letter:

"Under date of May 19, we called your attention to your past due account in the amount of \$31,245.85. We fully expect that this account would be paid by now, however, we cannot find a record of your paying it.

"Your next month's account is practically due as well so won't you please send us this past due account by return mail and if you prefer, include payment for the next month in your check. In any event, your March account must be paid as soon as possible."

I am going to omit reading these; counsel may if he is insistent upon it.

There is an October 17 letter referring to an August balance unpaid of \$21,706.

Another letter in October referring to the same August balance, and insisting upon the payment.

A November 21 letter referring to a September balance of \$18,404 unpaid.

A November 28, 1950 letter asking for the September balance of \$18,464.

A December 13 letter asking for the October balance of \$24,778.47, and referring to a few small items that I won't read.

A December 21 letter referring to the same balance still unpaid and ending with the paragraph:

"Since the end of the year is rapidly approaching

(Testimony of Gerald A. Hatfield.)

and we are most anxious to clear our records of items of this type, we ask that your check in the above amounts come forward as soon as possible.”

Here is another letter finally on the July—which is a duplicate of the others.

The Court: Take a recess.

(Short recess.)

Mr. Bronson: I offer these letters, which were read in whole or in part, as a single exhibit, our first in order.

The Court: May be admitted and marked.

The Clerk: Defendant's Exhibit A admitted and filed in evidence.

(Whereupon the group of letters above referred to were admitted into evidence and marked Defendant's Exhibit A.)

Mr. Bronson: Q. You stated this morning, Mr. Hatfield—I think it was this morning—in answer to a question by Mr. Garrison whether the transcript of the telephone conversation of October 31, 1951, which was read here by Mr. Garrison, contained all of the conversation you had. You recall that testimony? A. Yes, sir.

Q. That question. And you said no, you thought there was more on the disk and that you recalled that you asked Mr. Mark [164] Hart is Joe Lotz broke, and his answer was no, not that I know of.

Mr. Garrison: That is objected to, if the Court please, on the grounds Mr. Bronson has misquoted Mr. Hatfield in that Mr. Hatfield never referred to

(Testimony of Gerald A. Hatfield.)

a disk, because he doesn't know anything about how the transcript of the conversation——

Mr. Bronson: I will amend the question; the statement. It is only preliminary.

Mr. Garrison: Transcript, I think you mean.

Mr. Bronson: The transcript of it, yes. That would be the correct way to refer to it.

Now, at this time, if the Court please, I want to hand to the Clerk with the understanding he may deliver this to Mr. Garrison, an envelope containing a disk that I am holding up here. The envelope has our office heading on it and it is marked "Disk of phone conversation." The disk itself has a paster on it, 10-31-51, conversation M. Hart and Gerry Hatfield, and if I may, in view of that testimony, I will hand your Honor this record so that you may see the scoring on it made by whatever mechanism produced it, and the part that is un-scored.

The Court: All right.

Mr. Bronson: And as I stated, it is a machine called the Audograph, and there is an agency here in San Francisco [165] and can be taken there and reproduced into sound by counsel, if he wishes, and I hand it to the Clerk and ask it be marked our Exhibit next in order.

The Court: Be admitted.

Mr. Bronson: Confirmation of the correctness of the transcript counsel read from.

The Clerk: Defendant's Exhibit B admitted and filed in evidence.

(Testimony of Gerald A. Hatfield.)

(Whereupon the recording of the telephone conversation above referred to was admitted into evidence and marked Defendant's Exhibit B.)

Mr. Bronson: Q. Now, Mr. Hatfield, in that conversation that this transcript refers to there was a beginning and end of the conversation, was there not? A. Yes, sir.

Q. And there were some salutation words at the start and some sort of goodbye at the end of it, just as it was read? A. That's correct.

Q. All right. Now, you were shown an Exhibit—I won't try to find it here—but I think I can identify it, a new contract with Joe Lotz and your company dated September 1st, 1951. You have that in mind, do you? A. Yes, sir.

Q. And that was a contract that changed his privileges and [166] benefits in certain respects, did it not? A. That is correct.

Q. That is, as compared as to what he had enjoyed before and under that contract your retention of premium money was reduced from 15 per cent to 14 per cent, was it not?

A. Our retention, is that what you said?

Q. Yes. A. Yes, that's correct.

Q. And the settlement date was extended from 25 days to 75 days, was it not?

A. No, that is not correct.

Q. What was done?

A. Settlement date in that contract was 60 days.

(Testimony of Gerald A. Hatfield.)

Q. On that subject, had he enjoyed a 75 day settlement period prior to September 1?

A. Yes, he had.

Q And for how long had the 75 day period been in effect?

A. From May 1, 1951, until September 1, 1951.

Q. Did you have a written contract with Joe Lotz setting forth that particular change dated around May, 1951, or was that merely a verbal arrangement?

A. It was not only verbal, it was written in the form of a letter that I wrote to Mr. Lotz. However, I do not believe we ever got around to making up the amendment to that contract showing that change. In other words, that was an [167] amendment to his first original contract in effect.

Q When did you first discuss with him reducing your retention from 15 to 14 per cent?

A. That was first discussed in May of 1951.

Q. You have that letter?

A. I think we have it in our records, I am not sure.

Q. I didn't see your carbon copy of the letter, but I have the original here, I will show it to you and ask you if you can identify it. (Mr. Bronson showing letter to Mr. Garrison.)

Mr. Bronson: Q. I hand you the letter. Is that the letter you had reference to?

A. Yes, sir, this is the one.

Mr. Bronson: I will ask that be marked, and read it, your Honor please.

(Testimony of Gerald A. Hatfield.)

The Court: It may be admitted and marked next in order.

The Clerk: Defendant's Exhibit C admitted and filed in evidence.

(Whereupon the letter above referred to was admitted into evidence and marked Defendant's Exhibit C.)

Mr. Bronson: This is dated May 17, 1951, on the letterhead of Mid-States Insurance Company, 182 West Lake Street, Chicago. Mr. Joe Lotz, his address.

"Dear Joe,

"Because of lack of time this letter will be brief [168] but its purpose is to inform you of changes in your agency contract with us along the lines which we discussed during my recent visit with you. I have discussed the matters with Mr. Titus and I am pleased to advise that he has agreed with the changes I requested him to approve.

"Effective May 1st the Mid-States retention under your contract is reduced from 15% to 14%. With this additional 1% granted in your favor I trust you will show your appreciation by placing at least \$25,000 per month through Mid-States. Without a minimum volume of this amount coming to us I am sure you will agree that it will be hardly profitable for us to make this change. In our conversations you stated that this figure would be easily met every month and I know you will do your utmost to fulfill this statement. A formal amendment

(Testimony of Gerald A. Hatfield.)

endorsement to your contract will be forwarded to you at the earliest possible moment.

“We will also extend the terms of payment under the present contract allowing you 75 days for the payment of your premiums. In other words, the May premiums will be due and payable on or before August 15th and each succeeding month’s business will be on a similar basis. Now, Joe, with this extension in time of payment I hope you will see to it that such payments are received [169] by us no later than the date on which they are due and I hope it will never again be necessary for us to have to wire your office and request immediate payment. I think you should know that I had quite a difficult time in getting Mr. Titus to agree with these payment terms and his agreement to them is entirely contingent upon your performance in seeing that all future accounts are paid on or before the 75th day. In other words, if your account is not paid within the 75 days which this extension allows I am sure he will insist that the extension be canceled and the contract reverted to the original 30 day period. I do not want this to have to happen and I am sure you do not want this privilege retracted either and, thus, I am sure you will see to it that there will never be any cause for such action.

“As I told you in our conversation I am not able to duplicate at this time the guarantee commission amendment which you have on another contract. However, you stated this was not too important

(Testimony of Gerald A. Hatfield.)

from your point of view and I trust you are not disappointed in my inability to give you a similar agreement. Joe, I still would like a copy of it copied omitting the name of the company involved. All you need to do is copy the printed portion and omit the type written insertions and by doing this I do not think you will breach your word [170] pertaining to the amendment. I would like to show this to Mr. Titus because it is definitely a matter of competition which we have to face and, in my position, it is my prime duty to keep him informed of competitive conditions at all times. I will be sincerely grateful to you if you fulfill this request and of course, it will be held in the strictest confidence.

“Naturally, it is to our mutual benefit that the contents of this letter be held in strict confidence by you. I am trusting that you will not use the reduction in our retention as a wedge to secure a similar reduction in other contracts. It is not the purpose of the reduction we are granting you to start a war between retrospective companies as respects rates of retention and, for that reason, I am requesting that you do not divulge this information to anyone. I am sure, also, that you realize what an embarrassing spot I would be in if certain other agents should get wind of this change. Consequently, your secrecy on this factor is of utmost importance.

“I wish to thank you for the very enjoyable visit——”

(Testimony of Gerald A. Hatfield.)

I will omit that unless you want it, it is personal.

Mr. Garrison: No.

Mr. Bronson: That's Defendant's Exhibit C.

Q. Now, as you say there you wanted a minimum of \$25,000 a [171] month in gross premiums in order for Joe to earn—Joe Lotz to earn this reduction of one per cent in the Company's retention, right? A. Right.

Q. And in May it is true you were promoting him to write more and more business for you, is it not? A. That's true.

Q. And it is true you were doing that in June and July and August and September, also, is it not?

A. I can't answer that definitely, I would have to refer——

Q. Let me take it month by month. Weren't you promoting more business, for Joe to write more and more business in Mid-States in June?

Mr. Garrison: If the Court please, he just answered that question by saying he can't say offhand whether he was during that period or not. If counsel has some letters to Mr. Lotz I think he ought to produce them. He says he doesn't recall.

Mr. Bronson: A lot of help by way of an objection. I would like to know the grounds of the objection, your Honor.

Mr. Garrison: The grounds are that the question has been answered—asked and answered. He couldn't tell you whether he did during that period or not.

(Testimony of Gerald A. Hatfield.)

The Court: If he knows he may answer. Proceed.

Mr. Bronson: Q: Did you by letter, by telephone, by [172] agent or by employee of the Company call on Mr. Lotz in June soliciting him to write more business with Mid-States?

A. I do not recall.

Q. Did you in July by any of those means?

A. This is 1951 we are talking about?

Q. Yes, of course, it is the second month following the letter I just read.

Mr. Garrison: If the Court please, I suggest counsel's suggestion "of course it is" is unnecessary and redundant.

Mr. Bronson: Withdraw the "of course". I am referring to that year, Mr. Hatfield.

The Court: That is a trifle aggressive.

Mr. Bronson: I am afraid so, your Honor. I benefited very readily as soon as counsel made his objection. He guards his witnesses quite well, your Honor; counsel does.

The Court: What is it?

Mr. Bronson: He guards the witness quite well.

The Court: I don't think the witness needs any guarding.

Mr. Bronson: Well, maybe not.

The Court: I have listened to him for a couple of days and he is beyond the average, well beyond the average, very capable of taking care of himself.

Mr. Bronson: Q. Have you the question in mind, Mr. Hatfield? [173]

(Testimony of Gerald A. Hatfield.)

A. Yes. I cannot recall specifically, no.

Q. Well, let us take August. Would your answer be the same? A. Yes.

Q. 1951, I mean? A. Yes, sir.

Q. And September, 1951? A. Yes, sir.

Q. Just wouldn't know whether you communicated with him through yourself by any means, or through any other officer or agent of the Company?

A. Well, I would say this: In August in '51 when we first discussed giving him a new contract, of course we had in mind getting more business from him.

Q. You were anxious to get more business from him, or it was your concern or interest, was it not?

A. Yes.

Q. Well, now, when you increased his settlement—May I sit down—when you increased his settlement period, Mr. Hatfield, why did you do that? That is, when you raised from 25 days to 75 days?

A. Well, there are two or three answers to that. First, because he asked for it, and he pointed out in his request that he was having trouble getting his brokers and sub-agents to remit within 25 days so he could pay us. Also, he told me [174] he had received the same kind of consideration prior to that from our competitors, the American Fidelity and Casualty, and it was necessary for us, for me to do it to meet competition.

Q. Then can I summarize the thing in this wise:

(Testimony of Gerald A. Hatfield.)

In 1951, before you allowed him 75 days, you knew that he was floating on your business?

Mr. Garrison: That is objected to, if the Court please, on the ground what counsel means by floating has not been established——

Mr. Bronson: Withdraw it.

Mr. Garrison: ——by this witness——

Mr. Bronson: Withdraw it.

Mr. Garrison: ——and the actual understanding in insurance nomenclature. It is a term that counsel seems to enjoy using, because it apparently connotes some kind of—what he said the other day—to be kiting, I think, was the suggestion.

The Court: What is your understanding of the phrase “floating”?

The Witness: I never in my business consider the word “float”.

The Court: You have no conception of what it means?

The Witness: I know what it means, yes, sir.

The Court: What does it mean? [175]

The Witness: Means using someone else's money in the interim period before it is due.

The Court: Proceed, gentlemen.

Mr. Bronson: Now, will you state the question that brought the objection, please?

(Record read by the reporter.)

Mr. Bronson: Q. In the light of the explanation you gave Judge Roche, is that true or not?

A. No, I don't believe it is.

(Testimony of Gerald A. Hatfield.)

Q. Well, what does that mean, you just haven't any knowledge at all?

A. I mean I knew that he had a 25 day credit period, yes.

Q. Let us go back to these letters I read showing that during 1950, far from being current, he was being jacked up for balances running between 3 and 4 thousand dollars and \$21,000. You weren't in any doubt, were you, Mr. Hatfield, that that showed that he didn't have enough money in the bank to settle with you on the day he was supposed to settle, isn't that true?

Mr. Garrison: Objected to on the ground that counsel has interpreted the letters entirely against the tenor of the letters, and a misinterpretation of the meaning. The witness said that Mr. Lotz' account was current. Those letters simply are collection letters calling the agent's attention to the amount of his balance, and in those instances [176] that balance was two or three or four or ten days overdue. The evidence is, the fact is that the account was always paid, the money was ultimately always paid, and while some collection efforts were required, the accounts were never in default. Now, that is the obvious meaning of those letters and the suggestion that the account was not current seems to me to be wholly inconsistent with the evidence.

Mr. Bronson: Just a speech, your Honor, to help the witness out. That is my challenge.

(Testimony of Gerald A. Hatfield.)

The Court: Nothing unusual about that in these cases.

Mr. Bronson: No, but we don't like it—I don't like it.

The Court: Let us proceed.

Mr. Bronson: Will you state the question?

(Record read by the reporter.)

A. I had no knowledge of whatever amount he had in the bank. Those letters—I mean, his failure to pay right on the dot simply meant to me he was slow in paying, for whatever reason it was, I don't know.

Q. He was current, to you?

A. Yes, he was current in my opinion of the word current.

Q. All right. Now, let us get down to May, 1951, when you wrote this letter, which is Exhibit C, and when you changed his settlement period from 25 days to 75 days did you know then that he had been floating his business, [177] including his own commission, his agent's commission and his overhead on his office on his principal's money, on the insurance company's money?

Mr. Garrison: That is objected to, if the Court please, on the grounds it is assuming something not in evidence.

The Court: If he knows. Objection overruled.

The Witness: No, sir, I do not know.

Mr. Bronson: Q. You say the only reason you increased it was that he asked for it?

A. He asked for it, and to meet competition.

(Testimony of Gerald A. Hatfield.)

Q. And did you ask him why he wanted it raised from 25 to 75 days?

A. I probably did, I don't remember exactly.

Q. What did he say, if your memory serves you, when you asked him why he had to have all that time considering the amount of time you were giving him up to that time?

A. I think I already answered that question.

Q. You mean to say it was just to meet competition?

A. No, in my first reply to that question I stated that he told me that his sub-agents and brokers were so slow in paying their bills to him that he needed the extension of time in order to be able to remit to me on time.

Q. As a matter of fact, the great bulk of that business that he had from his sub-agents was cash within 30 days, [178] isn't that right?

A. I wouldn't know that; I don't know.

Q. You don't know it? A. No.

Q. Do you know how automobile finance business is written, that the mortgagee, or the conditional sale vendor, collects the premium with the writing of the contract of sale of the automobile?

A. I do.

Q. Well, now, you followed enough of this business of Joe Lotz to know that the great bulk of the money, the premium money that he received from sub-agents came with or immediately following the notice of the writing of the business, don't you?

(Testimony of Gerald A. Hatfield.)

A. No, I can't say that I do know that.

Q. You stated that the first time that you knew that Mr. Lotz was in New York and saw Mr. Hart there, the president of the American Plan, was on November 27, 1951. You gave that testimony this morning, isn't that true?

A. I don't remember whether that was the exact date or not, but it was around that time, yes.

Q. When you were out there at the end——

A. That's right.

Q. ——at the end of November.

I will read you this part in that connection, the [179] transcript of that record I have just put in evidence. This is part of the conversation you had on the telephone with Mr. Mark Hart on October 31. It follows the expression:

“Hart: And I said, ‘God bless you, go ahead.’

“Hatfield: Yeah.

“Hart: And I told you that before, because we weren't trying to get the whole thing. But he's got a better deal with you. I can't give him that deal. He came to New York and told me what you offered him.”

Q. Do you recall Mr. Hart saying that to you on the phone?

A. Must have been said, it is in the transcript. He doesn't say when he came to New York.

Q. No, but at least you knew about it on October 31, the date of that telephone call, didn't you, that he had been to New York and talked, that is,

(Testimony of Gerald A. Hatfield.)

Joe Lotz had been to New York and talked with Hart?

A. Yes, but I didn't know what time he had been in New York.

Q. All right, let us go back. In any conversation on August 15, or 14, when he was in your office following his trip to New York, did Mr. Lotz mention to you that he had been in New York on that occasion? A. No, sir, he did not.

Q. I am referring you to another portion of that transcript on another subject, Mr. Hatfield. It is right at the—very close to the start of it. Mr. Hart said to you:

“And they tell us that their deal with Mid-States gives them a 15% prepaid commission, so it's somewhat to his advantage to be able to rewrite this stuff. He's asked me if he could write it flat—he can't cancel flat.

“Hatfield: Yes.

“Hart: And I've said 'yes' and particularly so—and very frankly, Jerry, that he hasn't paid us for the premium.

“Hatfield: (Laughter)

“Hart: He's told you that, I believe.

“Hatfield: Yeah * * *”

Q. You remember that conversation?

A. Yes, sir.

Q. Well, then, Mr. Hart was not representing to you that his account with Joe Lotz at the time of this conversation was current, was he?

A. Yes, he was later on.

(Testimony of Gerald A. Hatfield.)

Q. You are referring to his statement of the due days? A. Yes.

Q. Get to that later. Now, I call your attention to a statement you made in answer to a question by Mr. Garrison as to the status of your account with Lotz in October, 1951, and your answer was that he was current then. Do you remember [181] that?

A. Yes, sir.

Q. Actually he owed you, on September 15, his balance on May business,—I mean on June business was \$29,000, approximately, at the time you referred to, did he not?

A. I would have to see the record, I don't know.

Q. Well, we will produce that.

Now, you testified to some scolding, or at least some reproach that you gave to Joe Lotz about not telling you that he was in New York talking to Hart. You recall that testimony?

A. Yes, sir.

Q. Well, is it your contention to this charge that Mr. Lotz should tell you every time he takes a trip to New York and who he sees?

A. Under ordinary circumstances, no, but under this circumstance I feel he should have.

Q. Well, you wouldn't expect him, if he took a trip on your business to see you, that he would have to go and tell Mr. Hart about it, would you?

A. Not in the ordinary course of business, but he was certainly concealing something from me in this instance.

Q. Now, Mr. Hatfield, you testified that some

(Testimony of Gerald A. Hatfield.)

members of your organization visited Lotz every month; is that true? A. Approximately.

Q. During the course of your agency, and who were, who would [182] those individuals be?

A. At one time Mr. Kledzik, and later Mr. Oldberg and Mr. Kledzik together.

Q. That was a routine visit that was made?

A. Yes, sir.

Q. And then other officers of your Company visited them, did they not, Mr. Cass?

A. Well, prior to my time, yes.

Q. Mr. Donnelly? A. Yes.

Q. And you said that you made a couple of trips a year after you came into this supervision scheme?

A. Yes, sir.

Q. And did Mr. Titus come?

A. The first time Mr. Titus came out here was in December of 1951.

Q. Didn't you ascertain, referring to the period of 1950 and 1951, that Joe Lotz was paying commissions up to 30 per cent to his sub-agents?

A. No, sir, I did not.

Q. Didn't you ascertain that his business operations were costing him at least 10 or 12 per cent of the premium dollar? A. No, sir.

Q. Didn't you ascertain what your loss ratios were month by month during 1950 and 1951? [183]

A. Yes, sir.

Q. When your loss ratios—your loss ratios increased sharply, did they not, beginning with 1951?

(Testimony of Gerald A. Hatfield.)

A. Sometime during '51; I don't know whether it was the beginning or not.

Q. Did you examine at that time—well, you know that they were running as high as 70 per cent and over during that year, did you not?

A. At the end of the year that was the loss ratio.

Q. Let us take in August and September; wasn't your loss ratio running as high as 70 per cent?

A. I do not know, I don't have that record with me.

Q. Well, let me ask you this: Did you ever make any examination up until the end of October to ascertain what he was paying to acquire business from his sub-agents? A. No, sir.

Q. And you insist that you didn't have any knowledge of any shaky condition of Joe's finances until the month of November 1951, is that right?

A. Yes, sir.

Q. And nobody in your organization ever brought you any information that that was a shaky account, is that right?

A. What do you mean by "shaky account"?

Q. Well, I will put it in better language. No one ever reported to you any danger, that is, in your own organization, [184] of continuing in business with Joe Lotz on account of his financial condition?

A. I don't recall any such report.

Q. Didn't you, when you first came into the Joe Lotz sphere, ask for an audit of his books?

A. No, sir.

(Testimony of Gerald A. Hatfield.)

Q. At any time when you thereafter, that is, from October, 1950 on until the end of November, did you ask for an audit? A. No, sir.

Q. Didn't you ask for any audit during the year 1951 at any time?

A. We asked for an audit at the end of 1951.

Q. No, but down to the end of October, 1951, is it your testimony that neither you nor anybody on behalf of your Company asked for any audit?

A. It is my testimony that I did not ask for any audit. I do not know—

Q. Let me ask you specifically—what?

A. I do not know whether anyone else in the company did or not.

Q. Well, the period that I mention, October, 1950, on to the end of 1951, you were the general manager and vice-president?

A. That is correct.

Q. And under your specific concern were the agency accounts? [185] A. Correct.

Q. Were they not? A. Correct.

Q. Well, now, are you stating that first that you asked for no audit yourself during that period?

A. That's correct.

Q. Did you ask anybody else to procure an audit from Lotz or Lotz' books?

A. I do not recall any such request.

Q. You don't recall any? A. No.

Q. Well, then, so far as your state of mind goes now that the Company, by yourself or any agent or officer of it, never initiated any proceedings to

(Testimony of Gerald A. Hatfield.)

examine the books of Joe Lotz to ascertain where he stood at any of the period I mentioned?

A. To the best of my knowledge, that's correct.

Q. And when this incident occurred in May, 1951, when he was back there telling you that he could get 75 days' time from other companies and would you give him 75 days, you went ahead and gave it to him, did you? A. That's correct.

Q. Without any thought of examining to what extent you were jeopardizing the Company's interest in so doing?

A. Our past experience hadn't indicated any such examination [186] was necessary.

Q. Well, I don't want to argue and I hope I won't promote an objection on that score, but Mr. Hatfield, when the man asked for 75 days, and according to you said it was a matter of competition or some other thing, you weren't under any doubt at all that he needed it to float his business to pay his agents and to keep his head up, now, isn't that true? A. No, that isn't true.

Q. And when you placed the \$25,000 a month minimum on the business he wrote in May and when in August you told him you wanted more and more business, actually your prime interest was getting premium volume into Mid-States, wasn't that right?

A. For good business, that is correct.

Q. It was good business?

A. No, I say we wanted good volume, that is correct.

Q. Well, as a matter of fact,—I hate to use the

(Testimony of Gerald A. Hatfield.)

term—but you were premium hungry, weren't you, at that time? It was a policy of the Company—I will put it this way in lieu of the other—it was a policy of the Company to go out and give more time to these people in order to get more business in, right?

A. Now, Mr. Bronson, I don't want to argue either—I am as passive a man as you—but this man had been an agent source for us since 1947 and an account we valued had [187] been taken away from us, and I was anxious to get it back. That is the whole sum and substance of it.

Q. That is a very satisfactory statement.

Mr. Garrison: I think it is likewise.

Mr. McKinnon: Well, I don't, as long as you are commenting, object to voluntary statements. That is the only way to balance it off.

Mr. Bronson: You see, I would be lost without Mr. McKinnon here.

Q. I am calling attention to a portion of the transcript in the bank case at page 79.

Mr. Garrison: 79?

Mr. Bronson: 79, yes. This is your testimony. May I read it or shall I show it to him first?

Mr. Garrison: Okay, go ahead.

Mr. Bronson: You know, your Honor, we get in the bad habit, you know, in that other building, where we get so many bad habits, of straying from the lectern.

The Court: No set procedure here. Some of my associates are more severe, but I am rather liberal.

(Testimony of Gerald A. Hatfield.)

Mr. Bronson: All right, thank you, Judge.

I am reading from page 79, line 19 of the testimony in the bank case given on May 7, 1953.

“Question: And is it true then, you knew in January of 1951 that he was paying as high as 30 per cent [188] to his sub-agents?”

Answer by yourself, “Yes, sir.”

Mr. Garrison: Mr. Bronson, I think in fairness to the witness you ought to let him refer to his testimony on that subject and be sure that you are talking about the same kind of information.

Mr. Bronson: When should I do that?

Mr. Garrison: Right now.

Mr. Bronson: All right. Want we to hand him the book?

Mr. Garrison: Let him look at it, identify the subject matter, because we are talking about something else.

Mr. Bronson: I want to be quite fair.

Mr. Garrison: I am sure you do.

(Mr. Bronson handing transcript to the witness, and the witness reading to himself.)

The Witness: So that the record may be clear, it is true that answer was given in this testimony, but that answer, I shall go on to explain further, applied to only one phase of business known as trailer home business.

Q. What?

A. Known as trailer home business.

Q. That is what you intended in that statement, is it?

(Testimony of Gerald A. Hatfield.)

A. Yes, farther on down it is, and furthermore, in this testimony you will find that I referred to a letter I had [189] written in January of 1951 wherein I had advised Joe that I had heard it rumored that he was offering 30 per cent commission, not that he had been paying it.

Q. What is the date of the letter?

A. January 25, 1951, and it pertained only to trailer home business on which any agent can pay 30, 35 or 40 per cent commission and make money.

Q. Mr. Hatfield, if he offered 30 per cent to an agent, sub-agent as a commission, there isn't any doubt about the sub-agent accepting it and with alacrity, is there?

A. Let me elaborate more on that letter. In that letter I was remonstrating with him for offering it and telling him not to offer such a rate of commission, because it wasn't necessary.

Q. Now, then, are you prepared to state what the average commission for the year, that is to sub-agents, the average commission that Joe Lotz' agency paid that was cast up by your auditors?

A. The average commission to what?

Q. That Joe Lotz paid to sub-agents for the year 1951?

A. No, I am not in a position to state what it was.

Q. Well, we will produce that, just to remind you that the average he paid to his agents was 26—nearly 27 per cent. Do you recall the figure produced by your auditor?

(Testimony of Gerald A. Hatfield.)

A. No, I don't recall ever seeing that figure.

Q. Here is a letter, photostat of a letter of August 17 written to Ray Titus from Dick Cass. Are you familiar with that matter, has it ever come to your notice so you can identify it? Mr. Titus is here in the courtroom and proposes to stay to the end of the trial, does he? A. Yes, sir.

Q. Well, I can take it up with him if you don't recognize it.

I will ask you to identify that as a photostat of a letter written by you?

A. Yes, sir, it is a copy, a memorandum I wrote to Mr. Hamburg.

Q. Mr. Hamburg is an employee of your company? A. He was at that time.

Mr. Bronson: We will offer that, if the Court please.

The Court: May be admitted and marked.

The Clerk: Defendant's Exhibit D admitted and filed in evidence.

(Whereupon a letter dated July 3, 1951 above referred to was admitted into evidence and marked Defendant's Exhibit D.)

Mr. Bronson: This is a letter, apparently inter-organization, your Honor, from Mr. Hatfield to Chuck Hamburg on July 3, 1951.

"Chuck, under date of May 17th I sent you a copy of my letter to Joe Lotz in which I advised him that we [191] would reduce our retention from 15% to 14% provided he wrote at least \$25,000 per month with Mid-States. In the same letter I also

(Testimony of Gerald A. Hatfield.)

agreed to extend the terms of payment of premiums to us in 75 days in lieu of the previous 25 day provision in his contract. Formal amendments to the contract are now being prepared by the legal department. The purpose of this memo is to advise you to watch carefully and see that premiums are remitted to us within the 75 days we are allowing because if Joe does not pay within 75 days then this extension will be void and the contract will revert back to the original 25 day period. Please call to my attention immediately if the premiums are not received by us within the 75 days allowed."

Q. I have a letter here June 7 purporting to be, Mr. Hatfield, from you to George Kledzik in Los Angeles. Will you read that, please, and tell me if you have, or can produce the letter that is referred to in there, or the statement that is referred to in—withdraw that.

First let me ask you is that a letter you wrote to George Kledzik?

A. Interoffice memo, yes.

Mr. Bronson: All right, I will put it in evidence now that it is identified. Will you mark that, please?

The Court: Be admitted and marked. [192]

The Clerk: Defendant's Exhibit E admitted and filed in evidence.

Mr. Bronson: I want to read this, if the Court please.

(Whereupon the letter above referred to was admitted into evidence and marked Defendant's Exhibit 3.)

(Testimony of Gerald A. Hatfield.)

“George, since writing you my three page long-hand memorandum last week, Ray and I have discussed the matter of Joe Lotz representing us in the Los Angeles area as respects making direct retrospective appointments. Both Ray and I feel we do not want him acting in this capacity because, confidentially, we do not think he is the type or caliber of an individual who should be representing us. We feel that you can do a much better job, making a much better impression upon prospective accounts and at the same time eliminating the under-rate commission which we would have to pay Lotz. Therefore, I think you should tell him definitely that we are not interested as respects the Los Angeles area but, if he has prospects for making direct contacts with Mid-States in his own territory, we will be happy to give him the same deal he has with American Plan.

“George, on your June 15th paycheck you will see a nice increase”—well, that is personal.

Mr. Garrison: That is personal. [193]

Mr. Bronson: We will omit that.

Q. Now, first and foremost, where is the three page longhand memo that you wrote a week before this June 7 day?

A. I don't have any idea.

Q. Well, were you present when we sent a young man from our office back there with an order of court asking you to produce documents of the kind referred to in here?

A. Yes.

Q. Did you look all over for it?

(Testimony of Gerald A. Hatfield.)

A. Absolutely, searched high and low for it. I don't think any copy was ever made. I think it was a personal memo between me and Mr. Kledzik.

Q. Wouldn't it get in the file?

A. Well, could be in his file.

Q. Whose? A. Mr. Kledzik's file.

Q. We asked you to produce all the records of the Company, wherever they were, respecting Joe Lotz for the period 1947 down to the end of 1951.

A. How could I produce something Mr. Kledzik had since he was no longer our employee, gone for over a year.

Q. I suppose you had an office down there?

A. Not down there any more, no.

Q. What did they do, throw it all in the scrap office when he closed or left? [194]

A. I don't know.

Mr. Garrison: Object to that on the ground it is argumentative.

Mr. Bronson: Well, no, I mean it——

Mr. Garrison: Immaterial issues in this case.

Mr. Bronson: We have a lot of documents we failed to get, but I want the one here where they were turning Joe Lotz' business down on the basis they mentioned here, and he has got a longhand three page memo, we want to see that.

Mr. Garrison: If the Court please, Mr. Hatfield wrote one of their former employees a longhand memo. Now that gentleman, I don't know where he is, he is no longer in our employ, and he took that memo, and no copies were made of it. We don't have

(Testimony of Gerald A. Hatfield.)

the memorandum any more. It went to the man to whom it was addressed. Why Mr. Bronson thinks that would be in our files, I don't know. Mr. Kledzik received it.

The Court: Who wrote the letter?

Mr. Garrison: Mr. Hatfield wrote the longhand letter to Mr. Kledzik—when did you write the letter, what is the date of that one?

Mr. Bronson: This is June 7, 1951.

The Witness: I presume it was in June, 1951.

The Court: Do you recall what you wrote? [195]

The Witness: I don't have any idea. I think it was purely—I don't think it would have anything to do with Joe Lotz, I think it was purely personal, I couldn't state definitely.

Mr. Bronson: Q. No copies made of it?

A. No, sir.

Mr. Garrison: Do you know where you were when you wrote it?

The Witness: I presume I was in Chicago, but I am not certain about that.

The Court: It is time to take the adjournment.

(Thereupon this case was adjourned to Wednesday, May 5th, 1954, at the hour of 10:00 a.m.) [196]

The Clerk: Gerald A. Hatfield, to the stand, heretofore sworn.

GERALD A. HATFIELD

a witness for the plaintiff, having been previously duly sworn resumed the witness stand for further cross examination.

Cross Examination—(Continued)

Mr. Bronson: Q. Mr. Hatfield, to clear up one matter, I have in my hands a copy of a report of Lester, Herrick and Herrick, the certified public accounts of this city, dated January 21, 1953. Would you look at that briefly and tell me whether you are familiar generally with that account that has been gotten up?

Mr. Garrison: Let me take a look at it, Mr. Bronson.

Mr. Bronson: I thought you had the identical thing.

Mr. Garrison: I do, if it is the identical thing.

Yes, we will stipulate that this audit was made by Lester, Herrick and Herrick at our request, and that it is complete and may be used without foundation.

Mr. Bronson: Thank you very much.

Mr. Garrison: You may read from it, or refer to it.

Mr. Bronson: I only want to read from it with reference to one matter that has reference to some of the testimony of [198] the witness on direct examination.

Mr. Bronson: Q. Now, on page 19 of the re-

(Testimony of Gerald A. Hatfield.)

port, Mr. *Garrison*—May I step up and be on the stand with the witness?

The Court: Be right at home here.

Mr. Bronson: Your Honor has the knack of making people feel that way, but would still like your okay.

The Court: It has been passed around generally I am supposed to be pretty severe.

Mr. Bronson: Not until you get into trouble with the United States Government, that is the only place that might be true.

Mr. Bronson: Q. Now you testified—is there a slip in there?

Well, I think on page 19 there is a schedule called “Summary of Insurance Written For The Period December 1, 1950 to September 30, 1952”, and that’s columnized on the left by the months of the years that I referred to in the title, and then the next is a column of totals, and then there are three columns, the first called “Mid-States Insurance Company”, next “American Fidelity and Casualty Company”, and the third column is “Other Companies”.

Now, if I may read into the record with you the underwritings for Mid-States, month by month, beginning in January 1951, down to and including August, 1951. This is Mid-States. January, 16,661—I will leave off the pennies in each case; [199] February, 13,932; March, 14,976; April, 433; May, minus 2,719; June, plus figure of 32,160; July,

(Testimony of Gerald A. Hatfield.)

minus figure of \$2,455; and August, plus figure of 34,252.

The same months, January to and through August for American Fidelity and Casualty, January, 12,591; February, 15,971; March, 20,081, April, 25,713; May, 83,753; June, 46,050; July, \$85,785; and August \$50,481.

Mr. Bronson: Q. You have the totals of those?

(Colloquy between counsel; inaudible to the reporter.)

Mr. Bronson: Q. Now, with regard to your testimony of yesterday, or the day before, that the account of Joe Lotz with your company, Mr. Hatfield, was current during the year 1950, I'm calling your attention to some testimony you gave in the trial of the bank case in this Court in May of last year, appearing at page 74. I think at the time, if I am not mistaken, you were being examined by Mr. McCallum. This starts at line 15:

"Isn't it a fact that Mr. Lotz was often delinquent in his payments?"

Your answer:

"He was delinquent during the year 1950 quite frequently, yes.

"Question: And also in the year 1951?

"Answer: No, sir, not in 1951."

And now, you gave that testimony, of course, at that time? [200]

Mr. Garrison: If the court please, may not the witness explain that answer, if he wishes to?

(Testimony of Gerald A. Hatfield.)

A. I gave the testimony at that time, yes. It is in the record there.

Mr. Bronson: Of course, when the witness doesn't suggest explaining, counsel interrupts in the nature of a guidance of him, Your Honor, and he has the right of redirect examination. It is an interruption of the orderly presentation of the cross examination. I don't mean to be captious about it, but it seems to me those suggestions shouldn't be made by counsel.

Mr. Garrison: My only point was that he asked the witness a question and the witness said "yes", but before he got a chance to complete his answer he proceeded on to another subject. He should have a right to clear up any apparent differences in that answer and his present testimony, if he wishes. That was my point.

The Court: Nothing before the Court, gentlemen. Proceed.

Mr. Bronson: Q. All right. Now, in connection with your statement——

"Question: And also in the year 1951?"

"Answer: No, sir, not in 1951."——

A. By that answer I meant he wasn't frequently, my answer previous to that that he was frequently delinquent in 1950, and when I said, "No, not in 1951," I meant he was not frequently delinquent in 1951. [201]

Q. I didn't catch any reference to "frequent" here.

(Testimony of Gerald A. Hatfield.)

“He was delinquent during the year 1950 quite frequently.”

A. Quite frequently, yes.

Q. Now, do you mean by delinquent in 1950 that he was current in 1950?

A. I mean this, Mr. Bronson: Current to me means——

Q. Answer the question first before you make your explanation. Does delinquent mean the same thing as current?

A. It does to me, yes.

Q. All right. You can explain it.

A. The reason I say that current to me means when an agent pays—perhaps he is slow—pays but he pays within a reasonable time and without any undue pressure on our part to get him to pay, and that is the history of the Joe Lotz agency. He always paid us, never had any extreme argument to pay us, never defaulted at any time, all it ever took was a series of form letters to get him to remit.

Mr. Bronson: Ask that the last part of the answer go out.

The Court: He wanted to explain his answer.

Mr. Bronson: All right.

The Court: No question there was a series of letters here, but in my mind it is pressing him pretty hard for the money, isn't that a fact?

The Witness: Well, they are form letters; we watched the agent's account, Your Honor. [202]

The Court: I understand that.

The Witness: But what I mean by pressure, it

(Testimony of Gerald A. Hatfield.)

didn't require any telephone calls or any visits to go out and see why he didn't pay.

The Court: Well, in any event the record speaks for itself.

Mr. Bronson: Very well. I have those letters, those are the 1950, the late 1950 and 1951 dun letters.

(Showing papers to Mr. Garrison.)

Mr. Bronson: May I read them in the record?

Mr. Garrison: Sure.

Mr. Bronson: I will offer another group of letters that have to do with the 1951, excepting the top one, which is December 28, 1950, which are of that character, if the Court please, telegrams and letters dealing with the period up to and including March 28, 1951.

The Court: May be marked next in order.

Mr. Bronson: May those be marked?

The Clerk: Defendant's Exhibit F admitted and filed in evidence.

(Whereupon the group of telegrams and letters above referred to were admitted into evidence and marked Defendant's Exhibit F.)

Mr. Bronson: If I may I will simply read the date, whether it is a wire or a letter, and the amount that is [203] covered in the dun.

First in this Exhibit F is December 28, 1950, addressed to Joe Lotz by Mid-States Insurance Company, signed by Hamburg:

"Imperative we receive \$24,778.47 past due Oc-

(Testimony of Gerald A. Hatfield.)

tober account. Also 13110 before the end of the year."

January 23, a letter addressed to Joe Lotz, signed Mid-States, a dun for \$18,754. November balance past due. I will read it:

"Under date of January 10, we called your attention to the past due November balance of \$18,-754.64. We surely expected that this account would be paid by now. However, we can't find a record of your paying it. Your next month account is practically due as well.

"Won't you please send us this past due account by return mail, and if you prefer, include the payment for the next month in your check."

The next is a letter of January 26, 1951, referring to the same account of \$18,754.00 past due and with the closing:

"Remit today." [204]

Now next is March 13, 1951, a letter to and from the same parties demanding the past due payment of \$22,467.

The next is a letter, March 22, same parties, addressee and sender, under date of March 13, "Under date of March 13 we called your attention to the past due balance of \$22,467.93. Fully expected you would have paid it by now.

The next is an ending with a request for immediate payment.

Next is March 28, 1951, a telegram:

"Have not received payment of January past due account in the amount of \$22,467. Remit today."

(Testimony of Gerald A. Hatfield.)

Q. Now, in further reference to that matter, Mr. Hatfield, I want to call your attention to the transcript of the trial in the bank case, page 75, beginning at line 6 at which the following occurred:

“Question. (By Mr. McCallum): Very well. I show you then a telegram dated June 1 and ask you if that to your knowledge was sent by an officer or representative of your company to Mr. Lotz?

“Mr. Garrison: We will stipulate it was.

“Mr. McCallum: Thank you. May I read this, then, if Your Honor please?

“The Court: Yes.

“Mr. McCallum: Addressed to Joe Lotz, dated June 1, 1951.

‘Have Not Received Payment Of March Past Due [205] Account In The Amount Of \$18,061.65 Remit Today.

Charles F. Hamburg, Jr., Mid-States Insurance Co.’”

Now, here is a letter dated June 6, 1951—I will show it to your counsel—and ask you to identify them.

Q. Is this a photostat of a letter written to yourself, Gerry Hatfield, by Ray E. Titus, President of your Company on June 6th?

Mr. Garrison: We will stipulate that it is.

A. Yes.

Mr. Bronson: Ask that be admitted, your Honor.

The Court: Be admitted.

Mr. Garrison: No objection.

(Testimony of Gerald A. Hatfield.)

The Clerk: Defendant's Exhibit G admitted and filed in evidence.

(Whereupon the letter above referred to was admitted into evidence and marked Defendant's Exhibit G.)

Mr. Garrison: Might not that be read?

Mr. Bronson: Yes, I propose to read it, counsel. June 6, 1951, on the inter-company correspondence heading of General Finance Corporation.

"I believe I already told you Kledzik should be responsible for lining up agents in the Los Angeles area, and I do not think you want to expand your activities with Joe Lotz.

"Again, I must say if we can't get better representation [206] in California than Joe Lotz, we will never stay out of trouble.

"I never should have permitted this situation to go along as long as it has."

The Court: What is the date of that?

Mr. Bronson: That is June 5 of 1951.

The Witness: I would like to explain what was behind that letter, if I may.

Mr. Bronson: I would suggest that that go for the cross examination. It is really not testimony of the witness, in view of the stipulation. It should be saved for the redirect.

Mr. Garrison: I think he is right.

Mr. Bronson: Q. Now again referring to the testimony that you gave in the trial, and from the same transcript at page 30—I am reading beginning line 8 and concluding on line 22 of that page.

(Testimony of Gerald A. Hatfield.)

Mr. Garrison's examination of yourself, Mr. Hatfield.

"Question: Mr. Hatfield yesterday testified to an amount of money that Mr. Lotz was indebted to Mid-States, I believe in August 1951, and you told me after the Court recessed that you were in error with respect to the amount you stated. Would you like to correct your testimony in that regard?"

"Answer: Yes, sir, I would like to correct it.

"Question: Will you tell us first what you testified to yesterday and what the correct figure should be?"

"Answer: As I remember yesterday I stated that the amount Mr. Lotz owed Mid-States Insurance Company as of August, 1951, was twenty to twenty-five thousand dollars.

"Question: What is the fact?"

"Answer: The true fact is, after checking my records, he actually owed Mid-States \$62,000 at that time."

And again referring to your testimony in the same record from page 79, and if I may, I will read a couple of pages of this because it is necessary to get the significance. I am starting at line 19 on page 79—going to read from line 15:

"Question: That's right. If I showed you a letter on that subject bearing the date of about January 25, 1951, would that refresh your recollection as to when you had that knowledge?"

"Answer: Yes, this is the account I had in mind; yes, sir.

(Testimony of Gerald A. Hatfield.)

“Question: And is it true then you knew in January of '51 that he”— that is, referring to Mr. Lotz—[208] was paying as high as 30 per cent to his sub-agents?

“Answer: Yes, sir.

“Question: Now, in addition to the payments of commissions to his sub-agents what other expenses did Mr. Lotz have?

“Answer: Mr. Lotz had all the expenses of running his office.

“Question: You mean, to pay his payroll, his rent, his telephone, all expenses of running a business, is that correct?

“Answer: That's right.

“Question: So then he had that plus 30 per cent of the dollar taken out, didn't he?

“Answer: Yes, sir.

“Question: Any other expenses?

“Answer: Claim adjustment expense, yes.

“Question: All right. Now, what was his loss ratio running in 1951?”

I will interrupt there to say that claims adjustment refers generally to the subject of loss ratio, does it not?

A. Yes, sir. Claims adjustment to loss ratio.

Q. Yes. A. No, I beg your pardon.

Q. Claims adjustment is the cost of adjusting?

A. That's right, but that is a separate figure, not figured [209] in the loss ratio.

Q. Then what you pay out, loss ratio, that is to

(Testimony of Gerald A. Hatfield.)

the policy holder for a bent fender, stolen car, whatever it may be; right?

A. That's right.

Q. And when he said another expenses, and the answer "Claim adjustment expense," that would be in addition to the commission he paid to get the business, the cost of running his office, and then the question follows:

"Question: All right. Now, what was his loss ratio running in 1951? "Answer: 1951?

"Question: Yes.

"Answer: It varied from 50 per cent to 75, 76 per cent.

"Question: Then, Mr. Hatfield, if Mr.—this is the 1951 loss ratio you just gave us the figure on?

"Answer: Yes, sir.

"Question: If in 1951 he was paying commissions to sub-agents of 30 per cent, he had his office expense in an amount which I presume you don't know, is that correct?

"Answer: That's correct.

"Question: Do you know that he had approximately 35 to 40 employees?

"Answer: I never knew he had anywhere near that many employees at that time. [210]

"Question: How many do you think he had?

"Answer: The most I ever saw in his office would not exceed 15.

"Question: I see. And his loss ratio was running, you said, from 50 to 75 per cent?

"Answer: Yes, sir.

(Testimony of Gerald A. Hatfield.)

“Question: How could he operate, Mr. Hatfield, under those circumstances?

“Answer: Well, he could—remember this, he had, he was representing other insurance companies and he could operate on the earnings of the other insurance companies as well as what he was earning from us.

“Question: He couldn’t operate on your company’s earnings, could he?

“Answer: Not on those figures, no, sir.”

Turning to another subject—before I do that, do you have those totaled?

(Colloquy between counsel; inaudible to the reporter.)

Mr. Bronson: I should, perhaps, take this up with counsel, your Honor, before reading in the record.

I would like to read into the record—it may be subject to correction by Mr. Garrison, the results of the computation of the total business, January to August inclusive, 1951, gross premiums of the two companies, and in the case of Mid-States, using the amounts where there [211] was a minus figure, the Mid-States for January to August, inclusive, of gross premiums and giving effect to those deductions, is \$107,240. For the same period for Mid-States it is \$340,425, a ratio of about three to one.

Mr. Garrison: Sorry, I think you said Mid-States and I think you meant—

Mr. Bronson: American Fidelity. Thanks for the correction. In the case of Mid-States the aver-

(Testimony of Gerald A. Hatfield.)

age figure per month for that period, taking into account the negative figures, is \$13,400 of average gross premiums per month, and at an annual rate of \$160,000.

Q. Those months that showed negative amounts, those were due to cancellations, were they not?

A. The negative amounts were produced by cancellation, yes.

Q. Yes. Were you present at a meeting in Chicago when Mr. Lotz was there and Mr. Titus was also there?

A. At what time?

Q. In May of 1951? A. Yes.

Q. You recall discussing with Joe Lotz the condition of his business in May, 1951, on the occasion he was back there?

A. No, sir.

Q. Did you invite him to come back there? [212]

A. No, sir.

Q. Or did he come on his own?

A. He came on his own.

Q. In view of an answer you gave yesterday—when I say “you” in a case of that kind, I meant to include anybody in your Company. To your knowledge was he asked to come back by anyone connected with your Company?

A. No, sir.

Q. Do you recall Mr. Titus saying to Joe Lotz in that meeting in the presence of yourself, “You are in trouble, Joe, but we are going to help you,” or words to that effect?

A. No, I do not recall it.

Q. Mr. Hatfield, you testified yesterday on di-

(Testimony of Gerald A. Hatfield.)

rect examination, or on the day before, that the retention of the Company out of Joe Lotz premiums, went through a course whereby at the start the Company took out 20 per cent as its retention; the Company's retention was thereafter reduced during the period thereafter and up to September 1, 1951, to 17 and a half per cent, then to 15 per cent, and then to 14 per cent, the latter under the arrangements you made with him in May and in September, 1951? A. That's correct.

Q. You did that because you were aware he wasn't making any money on the 20 per cent retention and later on the 17 and a half per cent retention? [213]

A. No, that isn't true. The records show different than that. I can show you the figures of his earnings.

Q. You don't suggest——

Mr. Garrison: Let him finish his answer.

Mr. Bronson: All right.

A. (Continuing): I can show you figures of his earnings throughout the years '47, '48, 9, '50 and '51, and they show he was earning good money, and all that time the loss ratio you introduced into the testimony yesterday showed he was earning good money in the years 1948, 1949, 1950.

Q. And when you reduced the Company's retention in the year 1951 to 14 per cent and swore Joe to secrecy on the thing, you did that because he needed 86 per cent instead of 85 per cent to keep his head above water, didn't you?

(Testimony of Gerald A. Hatfield.)

A. No, I did that in order to meet the competition. I couldn't meet the competition of giving him a guaranteed commission, as American Plan did, so I had to reduce my retention to make it more attractive to him, that is all.

Q. Mr. Hatfield, one of the things you said in that letter that was read yesterday was that—two or three places,—he wasn't to tell anybody about it so that the competition wouldn't know about it.

A. That's right.

Q. You weren't meeting competition then, were you?

A. I certainly was. I explained in that letter I didn't [214] want to start a retention war among the retrospective companies.

Q. I want to go back to this question about your knowledge of this situation. Now, you testified you had certain men calling on Joe Lotz all during the period once a month?

A. Approximately.

Q. I beg your pardon?

A. Approximately once a month.

Q. All right. One of them was named Kledzik, wasn't it?

A. That's correct.

Q. Another one named Oldberg?

A. That is correct.

Q. Those men were field supervisors, were they not, over a given territory?

A. To a certain extent, yes.

Q. Yes. Were they officers of the Company, either one of them?

A. Mr. Oldberg was an officer of the Company.

(Testimony of Gerald A. Hatfield.)

Q. Did he supersede Mr. Kledzik?

A. Yes.

Q. When did he supersede Kledzik, approximately; give us the best estimate you can when it was.

A. I would say approximately May of 1951.

Q. And what was his position in the Company, what title did he have; what title or titles did he have?

A. He had the title of resident vice-president, I believe [215] it was.

Q. You're vice-president too, aren't you?

A. Yes, sir.

Q. And did Mr. Kledzik have a title?

A. Resident secretary, I think.

Q. Both officers of the Company, then?

A. That's right.

Q. And one of them for one period and the other for the other were up here approximately once a month?

A. That's right.

Q. Right?

A. That's correct. And during the period from October 1950, when you assumed the position that you presently have, one of your duties was supervision of the agencies, wasn't it?

A. That's correct.

Q. And you worked in close collaboration with the field men, such as the two we named?

A. That's right.

Q. Now when you sent these dunning letters out

(Testimony of Gerald A. Hatfield.)

all during 1950 and 1951, weren't you sending copies of them to those men out in Los Angeles?

A. I don't think we did.

Q. You what?

A. I don't think we did send copies. [216]

Q. What is the state of your knowledge, that you don't know?

A. Well, I will have to say I don't know; I am not positive.

Q. All right. Now, if you're having trouble, let us take the letter that I read, June 6, 1951, from Mr. Titus, the brief letter here, that would be a thing that the field agent would know about, wouldn't he, right away? A. No——

Mr. Garrison: Pardon me. If the Court please, counsel objected to the witness referring to or explaining what the "trouble"—what the use of that term meant in that letter. Now, counsel is cross examining him on the use of the term "trouble" and I object to the question on that ground unless it is made more definite. The witness can explain what the letter meant when it said "trouble", it is presuming a broad use of the term "trouble" is intended when in fact it was not.

The Court: You may develop the facts.

Mr. Bronson: Counsel is testifying that there is a restricted meaning to the word and that I want to go out, the testimony of the counsel that it didn't mean that. He doesn't know anything about it, I take it, because this litigation wasn't even in the picture then. I mean, Mr. Garrison can't say that.

(Testimony of Gerald A. Hatfield.)

It is this interference with my questioning of this witness [217] that I object to, Judge.

Mr. Garrison: I don't want to be persistent in this matter, but it seems to me that when he objects to the witness explaining what was meant in the use of the term "trouble" in a letter, that it is unfair to the witness and not enlightening to this Court to thereafter refer to "trouble" in its broadest sense.

The Court: Well, trouble in its broadest sense means nothing to me. Trouble is so wide in scope.

Mr. Garrison: That is my point.

The Court: You have to nail it down to spell out something. Let's proceed.

Mr. Bronson: To come right between these dunning letters there is a perfectly good interpretation of it available for the Court.

Q. Now, then, did you have any correspondence, your office in Chicago, with Kledzik and Oldberg with regard to the estate of the account of Jot Lotz during the year 1951?

A. With regard to the estate of the account? The state of the account?

Q. How far behind he was.

A. I don't recall any, no, sir.

Q. Did you have any correspondence with him about the subject of the kind of business he was writing, standard or substandard during that period in 1951? [218]

A. I believe we did.

Mr. Bronson: We made a demand for correspondence of that kind, and we found none.

(Testimony of Gerald A. Hatfield.)

Q. Do you know where this correspondence that you had about substandard writing by Joe Lotz may be found today?

A. No, sir, we showed you everything we had.

Q. But you know of something that was not among the documents you sent us, then, on that subject, is that what you are saying?

A. No, I am not saying that. I said I believe we had some correspondence. I could be wrong.

Q. You made available to Mr. Weingarten of our firm three letter files representing correspondence from 1947 on through 1951 with Joe Lotz?

A. Yes, sir.

Q. Do you represent that that is all the correspondence you had with that agent?

A. I do.

Q. Well, getting back to these gentlemen Kledzik and Oldberg, did they, during the course of the correspondence that you were having with, communications of any kind with Mr. Lotz about substandard business, did they investigate those things on their visits, monthly, to his office?

A. About the substandard business, you mean?

Q. Yes. [219]

A. That was their prime duty, was to guide him in underwriting and settlement of claims.

Q. Now, you were good enough to state yesterday that substandard business may be very profitable, and that it may be very unprofitable, depending upon the rate that is charged?

A. Yes, sir.

(Testimony of Gerald A. Hatfield.)

Q. Yes. Well, did I understand that you were complaining to these gentlemen about the substandard business he was writing at any time during 1951 and having them look into it?

A. In August of 1951.

Q. Is that the first time?

Mr. Garrison: Just a moment, let Mr. Hatfield finish his answer.

Mr. Bronson: How can you tell he wasn't finished?

Mr. Garrison: Because his mouth was open as if about to speak.

Mr. Bronson: That is a good one.

Mr. Garrison: If you would give him half a second I think he can finish it.

The Court: Let us have the reporter read the question and the answer.

(Record read.)

Mr. Bronson: Counsel is intuitive. [220]

The Witness: (Continuing) Well, in August of 1951 wasn't the finish of my answer.

The Court: Well, finish it.

The Witness: All right. I would like to start over again. May I?

The Court: Sure, start over.

The Witness: You asked me if I were complaining to them about the substandard business at any time during 1951. We always watched the substandard business regardless of whether we have one rate chart which includes it or two rate charts, one

(Testimony of Gerald A. Hatfield.)

for substandard and one for standard, we always watch it, the amount of substandard business.

Now, what I started to say was in August of 1951 we introduced a new rate chart in the State of California, and this new rate chart was a single rate chart. In other words, we eliminated completely our previous substandard rate chart, and under the new rate chart we had to be doubly close in watching the amount of the substandard, those rates were not high enough to stand a great percentage of it.

Mr. Bronson: That concludes your answer, sir?

A. Yes, sir.

The Court: So I may follow this testimony, then you at all times had full knowledge of all of the transactions that went on between the parties? [221]

The Witness: You mean between the field men and Mr. Lotz?

The Court: Yes.

The Witness: I wouldn't say I had full knowledge; I had general knowledge.

The Court: They were your agents, that was their duty, was it not?

The Witness: That was their duty, yes, sir.

The Court: Proceed.

Mr. Bronson: Q. You gave them general instructions, did you not? For instance, Mr. Kledzik, when he went to work, and Mr. Oldberg, they had instructions about what they were to do?

A. Yes, sir.

Q. In connection with checking up on agents

(Testimony of Gerald A. Hatfield.)

such as Mr. Lotz, and those instructions included examination, or at least taking checks on the type of business he was writing?

A. That's right.

Q. Such as standard or substandard, the rates paid out for the acquisition of that business?

A. No, sir, we never asked them to check that.

Q. Mr. Hatfield, you don't mean that, do you?

A. Certainly.

Q. You mean your instructions didn't include that when you gave instructions to these field men to check how much he was [222] paying to get the business?

A. I don't recall ever giving Mr. Kledzik or Mr. Oldberg instructions to find out what rates of commission any of the sub-agents were paying.

Q. Do you know where any of the correspondence is between either Kledzik or Oldberg and your office about what they found as to their examination of Lotz' business? Where is that correspondence during the period that our order asked for?

A. Whatever correspondence there was in the group Mr. Weingarten saw.

Q. There was none and I assume you knew that. There is no correspondence between your office and your field agents about what you told them to do, what they did and what they reported back to you. There is a complete absence of that, and you, I assume, know that, you put the documents down in front of them and in your director's room in your plant in Chicago, you recall that?

(Testimony of Gerald A. Hatfield.)

A. Yes, sir.

Q. And you remember, don't you, that you read what was in there before you handed it to him, the attorney from our office? A. Yes, sir.

Q. Now, you know, and can you tell this Court today that there was not a single scrap of correspondence during the period [223] that the order of this Court called for from 1947 up to and through 1951, of correspondence between you and your field agents about the condition of Joe Lotz' going in any direction; you know that, don't you?

A. If it was not there I will have to say I know.

Q. There was plenty of correspondence, too, don't you know?

A. I don't know there was plenty.

Q. You know when we went over to the warehouse where Joe Lotz' records were kept, those records being in your possession, that there was the same absence of any correspondence between your office in Chicago and Joe Lotz' office?

A. Yes, sir, I found that out when I went with them.

Q. Can you tell this Court where—strike that.

I am asking you to keep in mind that there was the imminence of a lawsuit from early in December, 1951, when you were taking statements from this man Smead back there and Joe Lotz and Mr. Garrison came into the case as an attorney, in view of that, can you tell the Court where that correspondence has gone to, either the correspondence that should have been in Joe Lotz' office between him

(Testimony of Gerald A. Hatfield.)

and you, the correspondence in your home office between you and your field agents?

A. I do not know where it went to. I simply know we did nothing to conceal it nor to destroy it.

Q. You're speaking for whom, now? [224]

A. I am speaking for Mid-States Insurance Company.

Q. Coming down to those statements that were put in by Mr. Garrison yesterday and read to the Court, I mean the statements of June 6th that was signed by Mr. Smead and endorsed by Mr. Lotz and the others that followed that, you met Mr. Mead——

Mr. Garrison: Pardon me, I think you said June 6th.

Mr. Bronson: I mean December 6th. Thank you for the correction.

Q. (Continuing) You met Mr. Mead, the Oakland attorney—he is to be distinguished from Mr. Smead, who is the employee of Mr. Lotz,—but you met him at that time, did you not?

A. Yes, sir.

Q. And weren't you in his office the morning or afternoon of the day the first statement was taken on December 6th?

A. I don't recall the exact time; we were in his office on December 6th, yes.

Q. And you asked if you could take a statement of Joe Lotz, didn't you, and asked Mr. Mead if he could do it?

A. If I could take a statement from Mr. Lotz?

(Testimony of Gerald A. Hatfield.)

Q. Yes, either that day or the day before?

A. I don't recall asking Mr. Mead anything about it.

Q. Don't you remember that Mr. Mead made an appointment and called up Mr. Lotz from his office on the day that you were in his, Mr. Mead's office, and made an appointment for [225] ten o'clock on December 6th, the day that the statements were signed?

A. No, sir, I don't recall that.

Q. You just have no recollection of it?

A. No, I don't. The only time I recall being in Mr. Mead's office on December 6th was the night of December 6th.

Q. Is that the night that you were over at Lotz' office and that Mr. Smead was writing out a statement?

A. No, that was December 5.

Q. That was December 5. You don't remember being up in Mr. Mead's office earlier in the day, December 5, and asking to take the statement of his client Lotz?

A. No, I don't remember that, sir.

Q. And you don't remember that at that time in your presence he phoned Lotz and made an appointment for ten o'clock the following morning at his office?

A. No, sir, I don't remember that.

Q. Don't you remember when you came up to Mead's office with the statements that had been signed, or that were there for—that were brought up that had been prepared the night before, and

(Testimony of Gerald A. Hatfield.)

Mr. Mead reproached you for going ahead and having prepared a statement of his client, taking a statement from his client after having made an appointment to meet in his office?

A. In the first place I didn't take a statement from Mr. Lotz. [226] The statement I took was from Mr. Smead.

Q. Didn't Lotz sign it?

A. He signed it that night, yes, sir.

Q. What night?

A. The night of December 6th, I believe, and Mr. Mead was there and instructed him to sign it.

Q. You remember you or Mr. Titus, somebody offering statements to Mr. Mead to read and he refused to do so and again reproached you for the method in which you had taken them and not appearing by appointment?

A. I do not remember Mr. Mead ever reproaching me on anything. In fact, I am sure I can say he did not reproach me.

Q. I will conclude now, just a question or two.

Mr. McKinnon has corrected me on an error I made and I want to ask you that now. I referred you to a meeting in May in Chicago at which Mr. Lotz was present.

A. Yes.

Q. That was an error. I intended to designate the meeting on August 15 after Joe Lotz had been to New York, and came, stopped at your place on the way out.

A. Well, the August 15 meeting is what I had in mind.

(Testimony of Gerald A. Hatfield.)

Q. And you recall Mr. Titus saying to Mr. Lotz in your presence, "Joe, you are in trouble, and we are going to help you"?

A. I don't believe Mr. Titus made that statement; I don't [227] recall it at all.

Q. By the way, on the subject of this missing correspondence called for by our order, did you microfilm any of those records of Joe Lotz?

A. We microfilmed the agent's ledger sheets.

Q. What else did you microfilm?

A. To the best of my knowledge that was all we had microfilmed.

Q. Who else knows about it? Who ordered it?

A. Mr. Titus would know about that, then.

Q. Who ordered the work done?

A. Mr. Titus.

Q. Who did it?

A. It was done in Oakland; I don't know who did it.

Q. You don't know the name of the firm?

A. No, I don't.

Q. Were you out here at the time it was ordered? A. No.

Q. And it is your recollection that only the ledger sheets were microfilmed?

A. That is my recollection, yes, sir.

Q. By the way, who kept the firm ledger sheets that you microfilmed?

A. I think they were turned back to Mr. Lotz.

Q. Well, they are not missing, in other words?

A. No, they are not missing, so far as I know.

(Testimony of Gerald A. Hatfield.)

Q. I am not going to call your attention to all of this stuff, but I have many copies of a letter here. To identify it I will give the date and the opening part of it. It is a letter that Joe Lotz signed and is witnessed by Mr. Mead and Ralph Smead, and it is dated November 27, 1951, addressed to you.

Now, on November 27, 1951, you were in Oakland, were you not? A. That's correct.

Q. The letter starts in this way, and that will identify it, I think, for your Honor.

"Dear Mr. Hatfield:

"I wish at this time of my own free will and accord to relate to you the facts and circumstances surrounding the financial difficulties in which I find myself today and to explain to you in detail to the best of my knowledge how it happened."

Who dictated that letter?

A. I don't know who dictated it. It was written in Mr. Mead's office and I wasn't there at the time it was written.

Q. Who was there?

A. Well, as far as I know only Mr. Mead, Mr. Lotz, and Mr. Smead. I don't know, none of our representatives were there when it was written.

Q. You don't know who was there, then?

A. No.

Q. You don't know who dictated it?

A. No, I don't.

Q. Who else was here from the Mid-States at this time?

A. Mr. Czar, Mr. Oldberg, Mr. Kledzik.

(Testimony of Gerald A. Hatfield.)

Q. Is Mr. Czar a general counsel for your company? A. Yes, sir.

Q. And he is a house attorney, if I can use that term—does he have a private practice, or practice within?

A. No, he is just a house attorney, that's right.

The Court: What do you mean by a "house" attorney?

The Witness: I mean, he has no private practice.

The Court: Devotes his time exclusively to this insurance?

The Witness: To our organization.

The Court: I see. All right.

Mr. Bronson: That is all at this time, your Honor.

Mr. Kakures: Your Honor, I have a few questions at this time.

Cross Examination

Mr. Kakures: Q. Mr. Hatfield, when did the name Joe Lotz first come to your office or into your capacity as an officer of the Mid-States Insurance Company? [230]

A. You mean the exact date?

Q. No, not the exact date, but just give me the year, if you can remember that, when the name first——

A. Well, I first heard about him in 1947.

Q. I see. Was that through Mr. Donnelly, was it?

A. Through Mr. Donnelly and through Mr. Cass.

(Testimony of Gerald A. Hatfield.)

Q. I see. Did you and Mr. Donnelly ever discuss Mr. Joe Lotz? A. No, sir.

Q. During the year 1947 did you discuss Joe Lotz' insurance agency with anybody of Mid-States? A. Mr. Cass.

Q. And was there any discussion as to the ability or knowledge of Joe Lotz in the field of insurance underwriting?

A. Well, there might have been; I can't state definitely no, definitely yes.

Q. What is your personal opinion of Joe Lotz' insurance underwriting ability?

A. At the present time?

Q. Yes, sir.

A. I think he is very capable. He has shown that through his past experience with us through three and a half years, made good money off of it.

Q. Is there any doubt in your mind as to Mr. Lotz' honesty and integrity? [231]

A. Absolutely none.

Q. When was the first time you met Joe Lotz in Oakland, Mr. Hatfield?

A. I think it was July of 1950, first part of July 1950.

Q. And what was the scope or the purpose of the visit?

A. Oh, I was just making a good will visit, never called on the agents in California and this was my first trip to California.

Q. I see. At that time did you discuss any of

(Testimony of Gerald A. Hatfield.)

the workings or operations of the Joe Lotz Insurance Agency either with Mr. Lotz or Mr. Smead?

A. No, sir.

Q. Did you at that time have any purpose at that time to discuss the authority of Joe Lotz using—Joe Lotz having the authority to endorse checks made payable to Mid-States?

A. I had no purpose or no reason.

Q. Did Joe bring that up to you?

A. No, sir, that question has never been brought up by Joe.

Q. Have you and Mr. Lotz ever spent any time together socially? A. Sir?

Q. Have you spent any time at all with Mr. Joe Lotz, socially, dinner or spending the night out?

A. Certainly.

Q. At that time have you ever discussed business off the cuff with Joe Lotz?

A. No, sir, when we go out to play we play real good.

Q. Did you know when you first made your trip here, was it 1950, Mr. Hatfield?

A. Yes, sir.

Q. Was that the early part of the year?

A. No, that was July.

Q. July. Of course, you had knowledge at that time that he was writing for other insurance companies, is that correct?

A. I wouldn't say I had knowledge, but I certainly suspected it. I knew he wrote other types of business that we didn't write.

(Testimony of Gerald A. Hatfield.)

Q. I see. Did you know that—anything about his trustee account at that time, how he operated, how Joe operated, Joe Lotz operated in making payments to the various insurance companies, including yours?

A. No, sir, I did not; I had no reason to inquire.

Q. Did Joe Lotz ever tell you that he put some of his own money in the trustee account to make premiums, in order to meet premium payments to your Company or any other company?

A. Not to my knowledge. [233]

Q. Did he ever tell you he put in an inheritance of \$750?

A. I don't recall that, no, sir.

Q. Or had to borrow on his life insurance in order to make payments?

A. I don't remember him telling me that, no.

Q. Mr. Hatfield, can I make this question of you? What is the custom of the trade, or if I may call it that, when an agent is working insurance for one or more, say two or more insurance organizations, are they allowed to commingle their funds, or how is that worked out?

A. When you say are they allowed to commingle their funds, I don't know. I think that is up to the companies. You mean whereby they give him permission to commingle funds, if they so desire. I remember in one conversation with Joe I told him not to comingle his funds.

Q. What did Joe say to that? A. Sir?

Q. What did Joe say in answer to that?

(Testimony of Gerald A. Hatfield.)

A. He said he wasn't.

Q. Now, you say—is that a general practice or is it not a general practice?

A. I would hate to answer that. I don't know whether it is a general practice or not.

Q. You have no idea? [234]

A. By general practice, what do you mean?

Q. Of any insurance agent, not Joe Lotz in particular, but any general agent, insurance agent, handling insurance for two or more organizations do you know of your own knowledge, from your experience in the insurance field, whether there is a comingling of trust funds?

A. I don't think it is a common practice, no.

Q. Do insurance companies frown on that type of practice if brought to their knowledge?

A. No, I wouldn't say we would frown upon it.

Q. In other words, as long as they got their payments they didn't particularly care how the general agent operated, is that correct?

A. That's correct.

Q. Now, in 1951, Mr. Hatfield, approximately how many trips did you make to Oakland?

A. In 1951?

Q. Yes, sir.

A. Only two, I believe.

Q. I see. And the first trip was made when?

A. I think the first part of May or the latter part of April.

(Testimony of Gerald A. Hatfield.)

Q. What was the purpose of that particular trip?

A. Just a routine trip. I usually try to call on the agents twice a year, and this was just a routine trip, time to come out and see Joe again.

Q. You called on Joe Lotz, of course, and did you spend a number of days with Joe Lotz, or was it just a passing visit?

A. I think I spent three or four days.

Q. Did you discuss any of Joe Lotz' insurance operations at that time?

A. Just in generalities.

Q. I see. At that time did Joe ever bring up the fact that he wished he had the authority to endorse Mid-States checks made payable to Mid-States? [236]

A. No, sir, he did not. It was at that time that we discussed the May first amendment to his contract.

Q. What did he say about that?

A. Well, he said he needed a longer credit period.

Q. What did you say, Mr. Hatfield?

A. I asked him why. He said, well, his brokers, his agents were taking too long to pay him and he couldn't meet our twenty-five day limit.

Q. Did you ever tell him perhaps it would be wise for him, for Joe to lower the commissions paid to his sub-agents? Did you pass any general sug-

(Testimony of Gerald A. Hatfield.)

gestion to him of any kind in order to lower his overhead?

A. I think I might have, although I am not certain on it.

Q. And then the next time you came out to Oakland in the year 1951, was that around the month of November or December?

A. The latter part of November.

Q. And that was a special trip to see Joe Lotz' agency, was that correct?

A. That was a special trip, yes, sir.

Q. That was when things got a little rough, is that right?

A. That's right.

Q. And when did you first meet Joe on that second trip in 1951?

A. Well, let's see, we arrived here the morning of the 24th. I think we met Joe that afternoon, the afternoon of the 24th. [237]

Q. Did you consult with him at his agency or where?

A. In the Leamington Hotel.

Q. I see. And what was the topic of business there?

A. What his trouble was, his finances.

Q. Did Joe have any excuses or any suggestions to offer to you at that time, Mr. Hatfield?

A. You mean excuses for what?

Q. For the fact of his lagging behind, or the fact that he was slow in payment to your company, or just insurance business being slow period?

(Testimony of Gerald A. Hatfield.)

A. Yes, his prime excuse was that he had been too lax in his supervision of his own business, left too much up to another party, and things had gotten away from him.

Q. Did he tell you at that time he thought he could come out of it, isn't that right?

A. Yes, he did.

Q. What did you say, you would help him along?

A. At that time we thought we might and said we would try to help him, yes, sir.

Q. I see. This was some time early in December in 1951?

A. Latter part of November and very first part of December.

Q. And then a few days later, as you testified to, I believe it was either yesterday or the day before, Joe Lotz and you drove to San Francisco, is that correct?

A. That's right. [238]

Q. And on the way over there you said you stopped at a drive-in and had some lunch, is that correct?

A. That's right.

Q. And your particular trip that afternoon was to see the Insurance Commissioner in San Francisco?

A. That's right. Not the Commissioner, no, sir; to see the Rate Deputy.

Q. What was the purpose of that visit, Mr. Hatfield?

A. Well, we had been having a difference with

(Testimony of Gerald A. Hatfield.)

the insurance department for quite some time on our rate situation out here.

Q. You were interested in getting a high rate structure, is that correct?

A. Yes.

Q. And were you successful in that attempt?

A. No, I wasn't successful.

Q. I see. When did the Mid-States Insurance Company enter into the insurance business in California, Mr. Hatfield?

A. I believe approximately 1944.

Q. I see. And how did that insurance venture in California work out for Mid-States?

A. Well, parts of it worked out well and parts of it not so well.

Q. Isn't it true that shortly after you revoked Mr. Joe Lotz' agency that Mid-States Insurance Company withdrew from the insurance business in California? [239]

A. We ceased taking new business in the State of California.

Q. That was shortly after you revoked——

A. That is right.

Q. ——Mr. Lotz' agency, is that correct?

A. However, we have not withdrawn our certificate of authority, and our certificate of authority with the State is still in effect.

Q. As I understand it from the record the rate structure that you were interested in was later

(Testimony of Gerald A. Hatfield.)

granted by the Insurance Commission, is that correct? A. No, sir.

Q. It was not granted?

A. No, sir, I didn't have anything more to do with the insurance department after that meeting of November 24, but it wasn't granted at that time. We were still at a misunderstanding.

Q. When did you and the other officials of Mid-States Insurance Company contemplate, if I may say that, withdrawing from writing any further business in California, did that start in the early part of '51, or did you never discuss that?

A. Oh, yes, we discussed—we didn't discuss it at all, or didn't even have it in our minds until this mess at Lotz office came about.

Q. Well, would you say that your California trouble was due mainly to Joe Lotz' agency, is that correct?

A. What do you mean, "California trouble"?

Q. I mean the fact that your California—I mean, am I right in this observation, that your entrance into the insurance business in California didn't prove so profitable to Mid-States Insurance Company, or is that a mis-statement?

A. That is a mis-statement.

Q. Is it?

A. Except for the money we have lost on this Lotz deal, our other ventures in California were largely profitable.

Q. If it wasn't for the Lotz deal, you would still be doing business in California?

(Testimony of Gerald A. Hatfield.)

A. Yes, sir.

Q. Coming back to December, I believe it is December 6, Mr. Hatfield, that was a couple of days after you made that trip to San Francisco, I believe, did you have occasion to see Mr. Smead or Mr. Lotz in relation to having them make out some statèments in relation to their activity?

A. On December 6?

Q. Yes, sir, December 5 or December 6.

A. That's right.

Q. And when did you first approach them on that particular——

A. The morning of December 6.

Q. I see. And what was—what did you tell them?

A. I just told them I talked to Chicago the night before and I had received instructions to ask them to write out a statement on what they had told me previously. [241]

Q. First what did Mr. Lotz say to this?

A. Mr. Lotz didn't want to do it.

Q. Did he tell you why?

A. He was scared. He said, "I am scared to death of the people in New York. I don't know what to do."

Q. What did Mr. Smead tell you?

A. Mr. Smead readily agreed to write out a statement.

Q. Did you tell Mr. Smead or Mr. Lotz that you yourself needed the statements for your own pro-

(Testimony of Gerald A. Hatfield.)

tection and that you wouldn't use it against either Joe Lotz or Ralph Smead?

A. For my own protection?

Q. Yes. A. Absolutely not.

Q. Did Mr. Smead cooperate then with what you asked him to do? A. Did Mr. Smead——?

Q. Cooperate with you in writing out the statement?

A. He cooperated to my request to write it out, yes.

Q. The statements contained in Plaintiff's Exhibit 11, did he recall those of his own memory or recollection, or did you aid him in any respect as to events, chronological order of events?

A. He recall it all or what?

Q. Did you dictate any part of that statement to Mr. Smead?

A. There isn't one word of mine in that statement.

Q. How long did Smead take to prepare that statement? [242]

A. It took him a period of about five or six hours.

Q. Where were you, Mr.——

A. I was on the second floor.

Q. Mr. Smead was where?

A. On the first floor.

Q. And how did you pass your time for those five or six hours? A. Working like a dog.

Q. And did you ever stop in to see how Smead was getting along?

(Testimony of Gerald A. Hatfield.)

A. Oh, occasionally walked past his desk, say, "How you coming," something like that.

Q. Did Smead ever come over and ask you or ask for any information or suggestion of what he should put in his statement?

A. No, he knew what to put in it; he already told me the story.

Q. Did you have occasion in the writing of that statement for you and Ralph Smead to go out and have a couple of beers?

A. I don't recall; we might have.

Q. And approximately when was that statement finished?

A. I think about one o'clock in the morning.

Q. And was Joe Lotz there at all during that interval between that period of time?

A. I can't say that. He might have dropped in on the first [243] floor and I might not have known it.

Q. I see. When that statement was completed you took that statement and you went back to the hotel, is that correct? A. That is correct.

Q. Did you see Joe Lotz the next day?

A. Yes, I did.

Q. And you wanted him to also conform to that statement, at least make a marginal statement on that?

A. That wasn't done until in the presence of his attorney, in his attorney's office.

Q. And did you see Joe Lotz before——

(Testimony of Gerald A. Hatfield.)

A. I asked him the next day if he was going to prepare a statement like I asked him, yes.

Mr. Kakures: That is all.

The Court: Take a recess.

(Short recess.)

Redirect Examination

Mr. Garrison: Q. Mr. Hatfield, Mr. Bronson has interrogated you about the extent of your correspondence between you or others in the Mid-States Insurance Company and Mr. Lotz and Mr. Kledzik or Mr. Oldberg, and he has made the inference that there is a total absence of any such correspondence.

Now, as I understand it, Mr. Weingarten, of the firm of Bronson, Bronson and McKinnon, went to your office in Chicago [244] for the purpose of inspecting documents under the order, is that true?

A. That's true, yes, sir.

Q. Did you make certain files available to him?

A. Yes, sir.

Q. And did he make photostatic copies of some of those? A. Yes, sir, he did.

Q. Do you know approximately how many?

A. I thing in the neighborhood of 60.

Q. And how large were the files that you handed Mr. Weingarten that Mr. Bronson referred to as little files, how large were they?

Mr. Bronson: By the witness as a little file, counsel.

Mr. Garrison: Q. How large were they?

(Testimony of Gerald A. Hatfield.)

A. Those files were about one and a half to two inches thick, each file.

Q. Incidentally, all of these letters that were written Mr. Lotz regarding his account and payments, those were all furnished, were they not, to Mr. Weingarten?

A. Those all came from those files, yes, sir.

Q. I will show you Defendant's Exhibit G from Ray to Mr. Hatfield, and ask you if that was one that was furnished them out of those files?

A. It is.

Q. I will show you Defendant's Exhibit E, being a letter [245] from Jerry to Mr. Kledzik, dated June 7, 1951, and ask you if that was one that was furnished to them out of those files?

A. It is.

Q. I will show you another letter dated July 3, Jerry to Mr. Hamburg, and ask you if that was one that was furnished them out of those files?

Mr. Bronson: What is the exhibit number?

A. It is.

Mr. Garrison: Q. I show you a letter dated November 20 from Mr. Hatfield to Mr. Lotz with copies to Mr. Oldberg, Penfold, and Hamburg, and ask you if that was furnished to them out of those files?

A. Yes, sir.

Q. I show you another letter from Mr. Titus to Mr. Lotz with copies to Hamburg, Penfold, and Oldberg, and ask you if that was furnished to them out of those files?

A. Yes, sir.

(Testimony of Gerald A. Hatfield.)

Q. I show you another letter dated—I guess that is a copy of the previous one.

Show you a letter from Mr. Cass to Mr. Donnelly dated 5-21-47 and ask you if that was furnished to them out of those files?

A. Yes, sir, it was.

Q. Show you a letter dated March 12, Mr. Cass to Mr. Lotz and ask you if that was furnished to them out of those files? [246]

A. It was.

Q. I show you a letter dated May 2, Mr. Cass to Mr. Donnelly and ask you if that was furnished to them out of those files?

A. Yes, sir.

Q. I shan't go through the balance of these, but it is true, is it not, that you did furnish Mr. Weingarten with a substantial number of letters from officers of your company to Mr. Hamburg, Mr. Oldberg, Mr. Lotz and Mr. Donnelly?

A. That's correct.

Q. Now, then, let me ask you another thing: How long was Mr. Oldberg in the California area as an officer of the company supervising agents?

A. Well, he didn't come out here until the middle of 1951.

Q. And for the first period of time he was out here what did he do?

A. He was merely under-study to Mr. Kledzik to learn his activities.

Q. Did you have any occasion during that period to write him at all?

A. No.

Q. Then what was the total number of months

(Testimony of Gerald A. Hatfield.)

he was here before December when this exposure of this condition developed?

A. About four months.

Q. He was here only four months. How long was Mr. Kledzik here? [247]

A. I would say Mr. Kledzik was there about a year and a half.

Q. And during that period was there any particular volume of correspondence between him and the Lotz Agency regarding the Lotz Agency as such?

A. Very little.

Q. Do you deal with your field men as a rule through mimeographed bulletins covering the general problems of insurance underwriting?

Mr. Bronson: We object to this leading examination.

The Court: He may state whether or not.

Mr. Garrison: Q. How do you deal with your agents country-wide with respect to the common problems of running an insurance company?

A. By bulletins.

Q. Were those bulletins made available to Mr. Weingarten in those files? A. Yes, sir.

Q. All right. Did you or anyone else to your knowledge ever destroy a single document that had any materiality to this situation with Mr. Lotz?

A. Absolutely not.

Q. Did you ever hear of anyone destroying any?

A. No, sir.

Q. Did you see the file of correspondence that I

(Testimony of Gerald A. Hatfield.)

furnished [248] Mr. Bronson that they made photostat copies of? A. Yes, sir.

Q. And those letters in that file were letters to Mr. Lotz and others from you and Mr. Titus?

A. That is correct.

Q. All right. Now, in respect to these letters that were written—— A. Here they are.

Q. ——Mr. Lotz in connection with his account, Mr. Bronson asked you if it wasn't a fact and didn't you know as part of your experience in the insurance business that finance companies who placed this insurance always pay their accounts within thirty days, and you answered that question, I believe, did you not? A. I did.

Q. And is it a fact that they always pay their account within thirty days?

A. No, it is not.

Q. Let us just take an example, Mr. Hatfield, of the placing of a piece of business by a finance company, or a used car dealer and trace it up to the time it reaches the insurance company. What is the first thing that happens?

A. Well, the first thing that happens, the dealer who sells the automobile orders their insurance through the sub-agent.

Q. And how long does he have in which to pay his, to pay [249] that premium that he collects from the customer?

A. As a rule he has at least thirty days.

Q. All right. And then to whom does he pay that premium?

(Testimony of Gerald A. Hatfield.)

A. To the sub-agent, the man to whom he gave the order to.

Q. And how long does that sub-agent have within which to pay his premium to his principal?

A. Well, that depends upon his agreement with the general agent, but in most cases at least thirty days.

Q. And who is the sub-agent's principal?

A. The general agent.

Q. And then he pays his money—if we take Mr. Lotz in the particular example—he pays in the second thirty-day period, he is presumed to pay his payment to the general agent, Mr. Lotz?

A. That's correct.

Q. And is it a common practice for those people, like all other businesses, to, on occasion, have delays in their payments? A. Certainly.

Q. All right. Now, how long does the general agent, Mr. Lotz, have within to pay his premium to the insurance company?

A. Well, he had various terms of payment, with us.

Q. As testified here, all the way from twenty-five days to seventy-five days? [250]

A. That is correct.

Q. So that the total elapsed time, if you assume a sixty-day general agency credit period, the total elapsed time between the writing of that business and the time the principal, if it were all paid when due, before that premium reaches the insurance

(Testimony of Gerald A. Hatfield.)

company, is four months approximately, is that true?

Mr. Bronson: What is his answer to that question?

Mr. Garrison: Q. Thirty days——

Mr. Bronson: Wait a minute.

Mr. Garrison: Q. (Continuing) thirty days with the sub-agent, sixty days with the general agent——

A. No, that isn't true, because our agent, Mr. Lotz, under the sixty-day period, the sixty-day period——

Mr. Garrison: Q. Overlaps——

Mr. Bronson: Wait a minute. Wait a minute, let him finish, please.

A. (Continuing) the sixty days also include the term of credit he gives to the sub-agent and the sub-agent gives to the producer.

Q. What would be the total elapsed time, if they all paid when due, by the time the money would ultimately reach the insurance company?

A. Sixty days.

Q. All right. Now,——

The Witness: Can I add something to that?

Q. Certainly.

A. It is possible that it could extend to a period, and still be within the time limit, of almost ninety days, because a policy written—when a policy is written on the first day of September, that is September business reported to us in Mr. Lotz' account, and he has sixty days from the end of September to pay for the policy written on the first day.

(Testimony of Gerald A. Hatfield.)

Q. In that example there would be approximately ninety days? A. That is right.

Q. Is it common in insurance business generally for the agent or the sub-agent to have a credit period within which to pay the company the premiums? A. Oh, sure.

Q. That's standard practice?

A. Standard procedure.

Mr. Bronson: I object to counsel suggesting that is standard practice, let the witness——

Mr. Garrison: Common knowledge.

Mr. Bronson: Permit the witness——

Mr. Garrison: Withdraw the question.

Q. Is it common practice in the particular specialty that you deal in, retrospective insurance, for the general agent to have a credit period?

A. Yes, sir.

Q. And is that necessary because of the very thing that you [252] have explained to the Court, the time elements involved?

A. That's correct.

Q. All right. Now, you said that in your opinion the Lotz' account, during the periods of '47 up to this trouble that arose, was current?

A. Yes, sir.

Q. These letters that have been introduced are letters that are made up, described as form letters, that are sent to all agents?

Mr. Bronson: Well, that is telling him just what to answer, again, Your Honor please. I object again to his suggesting the answer.

(Testimony of Gerald A. Hatfield.)

The Court: I think that counsel isn't fully conscious of the leading and suggestive questions.

Mr. Bronson: It is old practice, Your Honor. I have known him for many years. He knows better.

Mr. Garrison: Q. All right. Just tell us, just characterize those letters, then. I simply wanted to identify the subject that I wanted to ask about. Just tell us what kind of letters those are?

Mr. Bronson: The letters speak for themselves, if Your Honor please, and I will object to the question.

The Court: What are those letters?

The Witness: These are letters asking for payment from the agent, and they are more or less standard in wording and [253] as to form.

Mr. Garrison: Q. Those are sent to any agent who is late in his payment?

Mr. Bronson: Same objection, telling him what you want him to say.

Mr. Garrison: Q. Did you send them to any other agent besides Mr. Lotz in these years in question?

A. We sent them to any and every agent who becomes past due.

Q. And what do you mean when you talk about an agent who is delinquent?

A. I mean simply that he has not paid us his account by the end of the term stated in his contract.

Q. And if he pays it within a short time thereafter?

(Testimony of Gerald A. Hatfield.)

A. Nothing occurs. It is of no concern to us, except that as soon as the time limit runs out on that particular agent we will send him a letter, something like that, to remind him it is due.

Q. No action is taken against him?

Mr. Bronson: Same objection, telling him again what to do.

Mr. Garrison: Q. Are there any penalties involved, or what do you do with respect to that agent in those circumstances?

A. Well, as I said, we simply send him a letter, and if he pays, fine, no penalty of any kind. [254]

Q. Supposing he doesn't pay for sixty or ninety days after the payment is due?

A. We send him a second letter and perhaps a telegram.

Q. And are there ever any penalties involved?

A. Never.

Q. Is that one of the problems of running an insurance company in relation to your agents?

Mr. Bronson: Telling him what the problems of insurance are, let him——

Mr. Garrison: Q. Can you tell us what the problems of——

Mr. Bronson: My objection is you put in a suggestion each time and it imparts an answer, then the bell is rung, Your Honor. I ask Your Honor to admonish this experienced practitioner to desist. There is always the suggestion that the witness needs the assistance of counsel. If Mr. Garrison doesn't want to fall into that situation.

(Testimony of Gerald A. Hatfield.)

Mr. Garrison: No, I wouldn't.

Mr. Bronson: I don't like to be in the position of jumping up all the time, but I don't propose to sit quiet while he——

The Court: His leading position is correct, we will concede that.

Mr. Garrison: Yes, sir, Your Honor.

The Court: All right, let us proceed.

Mr. Garrison: Q. I don't like to lead you. Just tell [255] us, Mr. Hatfield, what these letters, or what relation these letters have to the ordinary conduct of an insurance company?

A. I don't see how, as far as the credit relations between an agent and his insurance company are any different than the credit relations in any other business. An agent, certain agents are prompt pay; certain agents are slow pay, and certain agents vary. That is the same in this business as any other business.

Q. Anything different in respect to your relations with Mr. Lotz and some of your other agents?

Mr. Bronson: Object to that as incompetent, irrelevant and immaterial to this case what he is doing with other agents.

The Court: Not concerned with other agents, I take it.

Mr. Garrison: No, excepting that it bears out the problem I am trying to point up.

Q. Now, then, when the American Fidelity and Casualty Company entered the Lotz office, I believe

(Testimony of Gerald A. Hatfield.)

that was testified to as being in November—December of 1950, is that a fact?

A. I thought it was January of '51, but I am not certain.

Q. In either event, the latter part of '50 or the first of '51, what was the credit period that you were allowing Mr. Lotz under your then contract?

A. Twenty-five days.

Q. And what credit period did the American Fidelity and [256] Casualty Company allow him under their contract?

A. Sixty days, I believe.

Q. And what retention arrangement did you have with Mr. Lotz then?

A. Fifteen per cent.

Q. And what retention did the American Fidelity and Casualty make with Mr. Lotz?

A. I don't know.

Q. Now, then, did the premium volume that you received from Mr. Lotz during that year of 1951 decline?

A. You mean did it decline in 1951?

Q. Yes. A. Yes, sir, it did.

Q. Mr. Bronson has referred to page 19 of the Lester, Herrick and Herrick report and read off the writings in your company by Mr. Lotz by month and called attention to the fact that in April only \$433.00 of premiums had been written, and in June more cancellations occurred than premiums written; is that true? A. That's correct.

The Court: What is that date?

(Testimony of Gerald A. Hatfield.)

The Witness: 1951.

Mr. Garrison: That was in 1951.

The Court: What month?

The Witness: May and—— [257]

The Court: May and June?

The Witness: No, April and May, that was the four three three period.

Mr. Garrison: Q. And May was minus \$2,700.00. Now, in the months of April and May, tell me what volume was written on the American Fidelity and Casualty?

A. Month of April, \$25,713.00 was written with American Fidelity and Casualty, and in the month of May, \$83,753.00.

Q. So that is that, the competition that you referred to earlier when you said you had to meet that competition?

A. Yes, it certainly was indicative that I had lost the account.

Q. What was the next conversation that you had with Mr. Lotz regarding his account?

A. Well, it was during my visit here in the latter part of April or first part of May, 1951, and I asked him why I wasn't getting any more business.

Q. What did he say?

A. Well, he said that he had a better contract with American Fidelity.

Q. Did he tell you what it was?

A. Told me he had a longer credit period and that he had a guaranteed commission.

(Testimony of Gerald A. Hatfield.)

Q. What do you mean by "guaranteed commission?"

A. I mean that his commission under his American Fidelity [258] contract were guaranteed to amount to at least twenty per cent.

Q. Were you giving him any such guarantee?

A. No, sir.

Q. And that is the conversation you had at that time? A. Yes.

Q. Then when did you next talk with him?

A. Well, it was probably still during my visit, I was mulling over the situation in my own mind as to what we could do to get the account back. I asked him if I gave him a broader contract if I could get business from him again, and he said yes, and I asked him what he needed and he said he needed seventy-five days for a credit period, and he would also like for me to give him a twenty per cent guaranteed commission.

Q. Is that the competition you had reference to when you said you had to meet it?

A. That's right.

Q. Now, the next time you talked to him, I believe you testified, was when he came to Chicago in August? A. That is correct.

Q. And did you discuss that same subject with him on that occasion? A. That's right.

Q. And what was that conversation?

A. We again—we talked about the credit period, what he needed to operate with, the amount of retention, Mid-States [259] retention, that is, and also

(Testimony of Gerald A. Hatfield.)

the subject of paying him an advance commission came up, that I could allow him an advance commission in order to meet this twenty per cent guaranteed commission he had from the other company, that is why we finally agreed upon making a fifteen per cent advance.

Q. That was suggested to induce Mr. Lotz to make that contract with you? A. Yes.

Mr. Bronson: That calls for his conclusion, leading and suggestive.

Mr. Garrison: Withdraw the question.

Q. Mr. Lotz did make the contract with you on those terms? A. Yes, sir.

Q. That is what you meant when you said the competition? A. That is correct.

Q. Mr. Hatfield, Mr. Bronson asked you about loss ratio in your company in 1951, and made the point that it was seventy-one point one. Did the loss ratio for business written in your company in 1951 change by the month?

A. Yes, loss ratio always fluctuates by month, that's correct.

Q. And did it get higher in the latter part of '51 as compared to the earlier part of '51.

A. Very definitely.

Mr. Bronson: Suggesting the answer, Your Honor. I [260] object.

Mr. Garrison: Q. Tell us what the loss ratio was by months in the Lotz agency in 1951, and tell us why it became higher at the end of the year?

A. Well, I can't tell you by month.

(Testimony of Gerald A. Hatfield.)

Q. You have the figures?

A. I have them in my briefcase, I believe.

Q. Let's get them.

A. I know what you are referring to. That doesn't have the loss ratio figures on it. Those are by year, isn't it?

Q. Do you have a record of those figures?

A. These figures are just by year, Mr. Garrison.

Q. Will you get the figures from your briefcase, please, to show the loss ratio by months?

(Witness securing documents.)

A. Now, these loss ratios, figured by month, are those I computed this morning from the figures that were sent to us.

Q. Just give them to us.

A. In the month of January he had a loss ratio of 66.8.

The Court: 1951?

The Witness: January, 1951, yes, sir. Is 66.8 per cent. February 40.7 per cent, March 70 per cent even, April 112.4 per cent, May 83.5 per cent, June 75.4, July 45.8, August 36.9, and that is as far as I got in my computation.

Q. I see. And do you have any figures as to the loss ratio [261] in 1952?

A. Yes, the year 1952?

Q. Yes.

A. For the year 1952 the loss ratio was 31.6.

Q. The total, but the month, can you give it to us by the month?

A. No, I don't have that by the month.